SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 434

ADA L. BURROUGHS AND JAMES CANNON, JR.,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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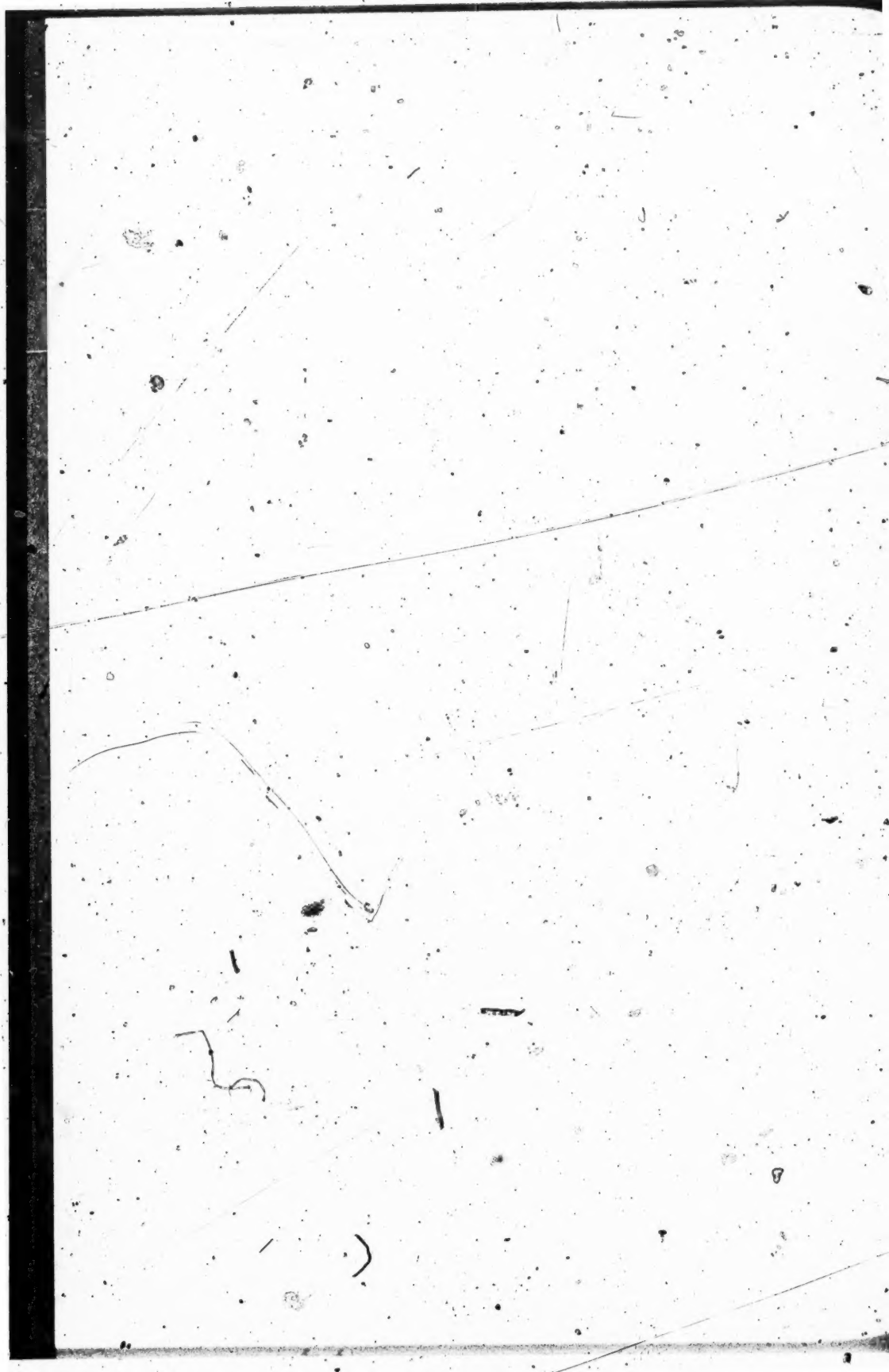
JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1933



[fols. a & 1]

SUPREME COURT OF THE DISTRICT OF COLUMBIA

Criminal. No. 51159

UNITED STATES

vs.

ADA L. BURROUGHS and JAMES CANNON, JR.

[Caption omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A CRIMINAL TERM OF THE OCTOBER TERM, IN THE YEAR 1931

INDICTMENT—Filed in Open Court October 16, 1931

First Count

DISTRICT OF COLUMBIA, ss:

The grand jurors for the United States of America, empaneled and sworn in the Supreme Court of the District of Columbia, holding a criminal term at the October term of said court in the year 1931, and inquiring for said District of Columbia, upon their oath present that Ada L. Burroughs, late of the District of Columbia, throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that at divers times during said period of time contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928

and that it thereafter, and during said period of time, to wit, between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which candidates and presidential and vice presidential electors were elected in the several States of the United States, became and was the lawful duty of said Ada L. Bur- [fol. 2] roughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the date of the filing thereof, if it should be filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of each of said contributions.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political committee, to wit, at all times between said 10th and 15th days next preceding said November 6, 1928, unlawfully and feloniously did willfully violate a certain provision of chapter 8 of title 2 of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, between said 10th and 15th days next preceding said general election, a statement pertaining to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully and feloniously willfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contribution, containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that James Cannon, Jr., during said period of time, to wit, between said 10th and 15th days next preceding said general election, at and within said District of Columbia, then and there well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, to file such statement pertaining to said contributions of said E. C. Jameson for said political committee with said Clerk, unlawfully and feloniously did willfully aid, abet, counsel, command, induce, and procure, and advise, incite, and connive at the

commission of the above-described offense on the part of said Ada L. Burroughs of willfully violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Second Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters committee anti-Smith Democrats"; that at divers times during said period of time contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

[fol. 3] $10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928

And that it thereafter, and during said period of time, to wit, between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which candidates and presidential and vice presidential electors were elected in the several States of the United States, became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the date of the filing thereof, if it should be filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political com-

mittee as aforesaid, together with the amount and date of each of said contributions.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political committee, to wit, at all times between said 10th and 15th days next preceding said November 6, 1928, unlawfully did violate a certain provision of chapter 8, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, between said 10th and 15th days next preceding said general election, a statement pertaining to the contributions aforesaid, and containing the information aforesaid, by then and there unlawfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contributions, containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said James Cannon, Jr., during said period of time, to wit, at all times between said 10th and 15th days next preceding said general election, at and within said District of Columbia, then and there well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, to file such statement pertaining to said contributions of said E. C. Jameson for said political committee with said Clerk, unlawfully did willfully aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the last above-described offense on the part of said Ada L. Burroughs of violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

[fol. 4] Third Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout the period of time extending from July 22, 1928,

to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that at divers times during said period of time contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928

and that thereafter, and during said period of time, to wit, on the 5th day next preceding November 6, 1928, the date on which a general election was held at which candidates and presidential and vice presidential electors were elected in the several States of the United States, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the date of the filing thereof, if it should be filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of each of said contributions.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political committee, to wit, on said 5th day next preceding said November 6, 1928, unlawfully and feloniously did willfully violate a certain provision of chapter 8, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, on said 5th day next preceding said general election, a statement pertain-

ing to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully and feloniously willfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever pertaining to said contributions, containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that James Cannon, Jr., during said period of time, to wit, on said 5th day next preceding said general election, at and within said District of Columbia, then and there well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such [fol. 5] treasurer of said political committee, and to be required by law, as such treasurer, to file such statement pertaining to said contributions of said E. C. Jameson for said political committee with said Clerk, unlawfully and feloniously did willfully aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the above-described offense on the part of said Ada L. Burroughs of willfully violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Fourth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that at divers times during said period of time contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 18, 1928

$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928

and that thereafter, and during said period of time, to wit, on said 5th day next preceding November 6, 1928, the date on which a general election was held at which candidates and presidential and vice presidential electors were elected in the several States of the United States, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the date of the filing thereof, if it should be filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of each of said contributions.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political commitee, to wit, on said 5th day next preceding said November 6, 1928, unlawfully, did violate a certain provision of chapter 8, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with [fol. 6] said Clerk of the House of Representatives of the United States, on said 5th day next preceding said general election, a statement pertaining to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contributions, containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said James Cannon, Jr., during said period of time, to wit, on said 5th day next preceding said general election, at and within said District of Columbia, then and there well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, to file such statement per-

taining to said contributions of said E. C. Jameson for said political committee with said Clerk, unlawfully did aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the last above-described offense on the part of said Ada L. Burroughs of violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Fifth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats;" that at divers times during said period of time and during the calendar year 1928, contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928
$4,300.00	December 6, 1928

And that thereafter, and during said period of time, to wit, on the 1st day of January, 1929, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement covering the calendar year 1928 and containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, to-

gether with the amount and date of each of said contributions.

[fol. 7] And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political committee, to wit, on said 1st day of January, 1929, unlawfully and feloniously did willfully violate a certain provision of chapter 5, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, on said 1st day of January, 1929, a statement pertaining to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully and feloniously willfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contributions, containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that James Cannon, jr., during said period of time, to wit, on said 1st day of January, 1929, at and within said District of Coumbia, then and there well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, then to file such statement pertaining to said contributions of said E. C. Jameson for said political committee with said Clerk, unlawfully and feloniously did willfully aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the last above-described offense on the part of said Ada L. Burroughs of willfully violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Sixth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a

certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that at divers times during said period of time and during the calendar year 1928 contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928
$4,300.00	December 6, 1928

[fol. 8] and that thereafter, and during said period of time, to wit, on said 1st day of January, 1929, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement covering the calendar year 1928 and containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of each of said contributions.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs during said period of time and while she was such treasurer of said political committee, to wit, on said 1st day of January, 1929, unlawfully did violate a certain provision of chapter 8, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, on said 1st day of January, 1929, a statement pertaining to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contributions, containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said James Cannon, jr., during said period of time, to wit, on said 1st day of January, 1929, at and within said District of Columbia, then and there well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law as such treasurer, then to file such statement pertaining to said contributions of said E. C. Jameson for said political committee with said Clerk, unlawfully did aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the last above-described offense on the part of said Ada L. Burroughs of violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Seventh Count

And the grand jurors aforesaid upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that during said period of time and during the calendar year 1929, to wit, on January 14, 1929, a contribution of money, to wit, three thousand dollars, was made by one E. C. Jameson, of New York City, New York, for said political committee; and that thereafter, and dur-
[fol. 9] ing said period of time, to wit, between the 1st and 10th days of March, 1929, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the day of the filing thereof, if filed, and containing the name and address of said E. C. Jameson, the person who made said last-mentioned

contribution for said political committee as aforesaid, together with the amount and date of said contribution.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political committee, to wit, at all times between said 1st and 10th days of March, 1929, unlawfully and feloniously did willfully violate a certain provision of chapter 8, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, between said 1st and 10th days of March, 1929, a statement pertaining to the contribution last aforesaid and containing the information in this count of this indictment aforesaid, by then and there unlawfully and feloniously willfully failing to file with said clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contribution and containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said James Cannon, jr., during said period of time, to wit, at all times between said 1st and 10th days of March, 1929, at and within said District of Columbia, then and there well knowing all the premises in this count aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, under the circumstances and conditions aforesaid, then to file such statement pertaining to said contribution of said E. C. Jameson for said political committee with said clerk, unlawfully and feloniously did willfuly aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the last above-described offense on the part of said Ada L. Burroughs of willfully violating said provision of said chapter 8 of said title 2 of said United States Code in the manner in this count aforesaid, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Eighth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs,

throughout the period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters [fol. 10] Committee Anti-Smith Democrats"; that during said period of time and during the calendar year 1929, to wit, on January 14, 1929, a contribution of money, to wit, three thousand dollars, was made by one E. C. Jameson, of New York City, New York, for said political committee; and that thereafter, and during said period of time, to wit, between said 1st and 10th days of March, 1929, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the day of the filing thereof, if filed, containing the name and address of said E. C. Jameson, the person who made said last-mentioned contribution for said political committee as aforesaid, together with the amount and date of said contribution.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, during said period of time, and while she was such treasurer of said political committee, to wit, at all times between said 1st and 10th days of March, 1929, unlawfully did violate a certain provision of chapter 8, of title 2, of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, between said 1st and 10th days of March, 1929, a statement pertaining to the contribution aforesaid and containing the information aforesaid, by then and there unlawfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contribution and containing any such information.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said James Cannon, jr., during said period of time, to wit, at all times between said 1st and 10th days of March, 1929, at and within said Dis-

trict of Columbia, then and there well knowing all the premises in this count aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, under the circumstances and conditions aforesaid, then to file such statement pertaining to said contribution of said E. C. Jameson for said political committee with said Clerk, unlawfully did willfully aid, abet, counsel, command, induce and procure, and advise, incite, and connive at, the commission of the last above-described offense on the part of said Ada L. Burroughs of unlawfully in the manner in this count aforesaid violating said provision of said chapter 8 of said title 2 of said United States Code, and so then and there was a principal in the commission of that offense.

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Ninth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout said period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which during that period ac- [fol. 11] cepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that at divers times during said period of time contributions of money were made by one E. C. Jameson of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928
$4,300.00	December 6, 1928
$3,000.00	January 14, 1929

and that at certain times during said period of time, to wit, between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which candidates and presidential and vice presidential electors were elected in the several States of the United States, on the 5th day next preceding said date of November 6, 1928, on the first day of January, 1929 and between the 1st and 10th days of March, 1929, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States, to wit, in said District of Columbia, a statement, complete as of the day next preceding the date of filing thereof, if filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of any of said contributions made before the time when any of said statements was so required to be filed.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs and James Cannon, jr., hereinafter called defendants, said James Cannon, jr., throughout said period of time, being the chairman of said political committee, continuously throughout said period of time, and while said Ada L. Burroughs was such treasurer of said political committee and said James Cannon, jr., was chairman thereof as aforesaid, each of said defendants then well knowing all the premises aforesaid, unlawfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons to said grand jurors unknown, to commit divers, to wit, four, offenses against the United States, that is to say, the four willfully-committed offenses on the part of said Ada L. Burroughs, as treasurer of said political committee, charged against her in the first, third, fifth, and seventh counts of this indictment, the allegations of which said counts descriptive of said offenses respectively, and of the circumstances and conditions under which they were so committed, are incorporated in this count, by reference to said first, third, fifth, and seventh counts, as fully as if they were here repeated.

[fol. 12] Overt Acts

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, at the sev-

eral times and places hereinafter mentioned in connection with their names, and to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement, did do, among many others, certain acts; that is to say:

1. Said Ada L. Burroughs, as treasurer of said political committee, on October 30, 1928, at and within said District of Columbia, filed with the Clerk of the House of Representatives of the United States a certain written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from September 1, 1928, through October 25, 1928.

2. Said Ada L. Burroughs, as treasurer of said political committee, on November 3, 1928, at and within said District of Columbia, filed with said Clerk of the House of Representatives of the United States a certain other written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from October 26, 1928, through November 1, 1928.

3. Said Ada L. Burroughs, as treasurer of said political committee, on January 2, 1929, at and within said District of Columbia, filed with said Clerk of the House of Representatives of the United States a certain other written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from July, 1928, to January 1, 1929.

4. Said Ada L. Burroughs, as treasurer of said political committee, on February 15, 1929, at and within said District of Columbia, filed with said Clerk of the House of Representatives of the United States a certain other written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from January 1, 1929, to February 11, 1929.

5. Said James Cannon, jr., on October 17, 1928, at and within said District of Columbia, deposited in the bank of the Continental Trust Company there, to the credit of the account of "James Cannon, jr., chairman," two certain checks, each dated New York, October 16, 1928, and drawn by said E. C. Jameson upon the Lawyers Trust Company of New York, for the payment of $5,000.00 to the order of

said James Cannon, jr., one of said checks being number 1785 and the other 1786.

6. Said James Cannon, jr., on October 23, 1928, at and within the District of Columbia, paid the sum of $2,000.00 to said political committee.

7. Said James Cannon, jr., on said October 23, 1928, at and within said District of Columbia, paid the sum of $832.50 to said political committee.

8. Said James Cannon, jr., on February 12, 1929, at and within said District of Columbia, sent by telegraph of the Postal Telegraph-Cable Company to said E. C. Jameson a certain day letter, that is to say, a day letter of the tenor following:

[fol. 13] [Day Letter]

February 12, 1929.

E. C. Jameson, Mountain Lake Club, Lake Wales, Florida:

Tried talk long distance New York, but office closed Lincoln's birthday. After careful examination records, think statement should be Quote Paid Headquarters Committee Anti-Smith Democrats seventeen thousand three hundred, paid Virginia Committee Anti-Smith Democrats forty-eight thousand, making total sixty-five thousand three hundred. End Quote. This will correspond exactly with our official reports. Call Lincoln two-nine-four-six Washington any time after eight-thirty until midnight to-night, when leaving for New York. Sailing Thursday.

James Cannon, Jr.

Conclusion

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said defendants, at the time and place in this count aforesaid, in manner and form in this count aforesaid, unlawfully and feloniously did conspire to commit offenses against the United States and at the several times and at the place aforesaid did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Tenth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs, throughout said period of time extending from July 22, 1928, to and including March 16, 1929, was the treasurer of a certain political committee which during that period accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two States, the name of which said committee then was "Headquarters Committee Anti-Smith Democrats"; that at divers times during said period of time contributions of money were made by one E. C. Jameson, of New York City, New York, for said political committee, as shown by the following table:

$10,000.00	September 18, 1928
$10,000.00	September 28, 1928
$10,000.00	October 9, 1928
$5,000.00	October 16, 1928
$5,000.00	October 16, 1928
$8,000.00	October 19, 1928
$10,000.00	October 19, 1928
$4,300.00	December 6, 1928
$3,000.00	January 14, 1929

and that at certain times during said period of time, to wit, between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which candidates and presidential and vice presidential electors were elected in the several States of the United States, [fol. 14] on the 5th day next preceding said date of November 6, 1928, on the first day of January, 1929, and between the 1st and 10th days of March, 1929, it became and was the lawful duty of said Ada L. Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States, to wit, in said District of Columbia, a statement, complete as of the day next preceding the date of the filing thereof, if filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of any of said contributions made before the time when any of said statements was so required to be filed.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs and James Cannon, jr., hereinafter called defendants, said James Cannon, jr., throughout said period of time, being the chairman of said political committee, continuously throughout said period of time, and while said Ada L. Burroughs was such treasurer of said political committee and said James Cannon, jr., was chairman thereof as aforesaid, each of said defendants then well knowing all the premises aforesaid, unlawfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit divers, to wit, four, other offenses against the United States, that is to say, the four offenses on the part of said Ada L. Burroughs, as treasurer of said political committee, charged against her in the second, fourth, sixth, and eighth counts of this indictment, the allegations of which said counts descriptive of said offenses respectively, and of the circumstances and conditions under which they were so committed, are incorporated in this count, by reference to said second, fourth, sixth, and eighth counts, as fully as if they were here repeated.

Overt Acts

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, at the several times and places hereinafter mentioned in connection with their names, and to effect the object of the unlawful and felonious conspiracy, combination, confederation and agreement in this count charged, did do, among many others, certain acts; that is to say:

1. Said Ada L. Burroughs, as treasurer of said political committee, on October 30, 1928, at and within said District of Columbia, filed with the Clerk of the House of Representatives of the United States a certain written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from September 1, 1928, through October 25, 1928.

2. Said Ada L. Burroughs, as treasurer of said political committee, on November 3, 1928, at and within said District of Columbia, filed with said Clerk of the House of Representatives of the United States a certain other written report of said Ada L. Burroughs as such treasurer purport-

ing to show receipts and disbursements of said political committee from October 26, 1928, through November 1, 1928.

[fol. 15] 3. Said Ada L. Burroughs, as treasurer of said political committee, on January 2, 1929, at and within said District of Columbia, filed with said Clerk of the House of Representatives of the United States a certain other written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from July, 1928, to January 1, 1929.

4. Said Ada L. Burroughs, as treasurer of said political committee, on February 15, 1929, at and within said District of Columbia, filed with said Clerk of the House of Representatives of the United States a certain other written report of said Ada L. Burroughs as such treasurer purporting to show receipts and disbursements of said political committee from January 1, 1929, to February 11, 1929.

5. Said James Cannon, jr., on October 17, 1928, at and within said District of Columbia, deposited in the bank of the Continental Trust Company there, to the credit of the account of "James Cannon, jr., chairman," two certain checks, each dated New York, October 16, 1928, and drawn by said E. C. Jameson upon the Lawyers Trust Company of New York, for the payment of $5,000.00 to the order of said James Cannon, jr., one of said checks being numbered 1785 and the other 1786.

6. Said James Cannon, jr., on October 23, 1928, at and within said District of Columbia, paid the sum of $2,000.00 to said political committee.

7. Said James Cannon, jr., on said October 23, 1928, at and within said District of Columbia, paid the sum of $832.50 to said political committee.

8. Said James Cannon, jr., on February 12, 1929, at and within said District of Columbia, sent by telegraph of the Postal Telegraph-Cable Company to said E. C. Jameson a certain day letter, that is to say, a day letter of the tenor following:

[Day Letter]

February 12, 1929.

E. C. Jameson, Mountain Lake Club, Lake Wales, Florida:

Tried talk long distance New York, but office closed Lincoln's birthday. After careful examination records, think

statement should be Quote Paid Headquarters Committee Anti-Smith Democrats seventeen thousand three hundred, paid Virginia Committee Anti-Smith Democrats forty eight thousand, making total sixty-five thousand three hundred. End Quote. This will correspond exactly with our official reports. Call Lincoln two-nine-four-six Washington any time after eight-thirty until midnight tonight, when leaving for New York. Sailing Thursday.

James Cannon, Jr.

Conclusion

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said defendants, at the time and place in this count aforesaid, in manner and form in this count aforesaid, unlawfully and feloniously did conspire to commit offenses against the United States and at the several times and at the place in this count aforesaid did do acts [fol. 16] to effect the object of the conspiracy; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Leo A. Rover, United States Attorney.

(Endorsed:) Crim. No. 51159. United States vs. Ada L. Burroughs, James Cannon, jr. Sec. 252 (b), 252 (a), and 244, title 2, and sec. 88, title 18, U. S. C. Violation Federal corrupt practices act and conspiracy so to do. Witnesses: Rev. Arthur J. Barton, Rev. J. Sidney Peters, Hon. Wm. Tyler Page, Lee P. Oliver, Col. Wade H. Cooper, Charles W. Warden, Edwin C. Jameson, Harold F. Healey, Fred C. Wegener, Hon. Joseph S. Frelinghuysen, R. F. deClairmont, Ernest M. Kull, Perry Seay, John A. Booker, Samuel L. Barrow, Frank W. Sheffield, Charles B. Stevens, Rhae A. Meyers, Walter W. Johnston, Frank Lyon, Ruby B. Brooke, Edward J. Armbruster. A true bill: Theodore Bennett Gittings, foreman.

In Supreme Court of District of Columbia

Demurrer—Filed November 2, 1931

* * * * * * *

Now come the defendants James Cannon, junior, and Ada L. Burroughs, by counsel, and they and each of them demur

to the indictment filed against them in this cause, and to each and every count thereof, and say that the said indictment and each and every count thereof is bad in substance.

Robert H. McNeill, H. W. Nice, Attorneys for Defendants.

Service of copy acknowledged this 2nd day of Nov. '31.

J. J. Wilson, Asst. U. S. Atty., D. C.

GROUNDS OF SAID DEMURRER

The grounds in support of the foregoing Demurrer are the following:

1. The act of Congress entitled the "Federal corrupt practices act," approved February 28, 1925 (Title II, U. S. Code, secs. 241-256), and section 244 thereof, upon which said act and section said indictment is based, is in violation of section 1 of Article II of the Constitution of the United States, in so far as it attempts to regulate contributions and expenditures made to influence the election of presidential and vice presidential electors in the several States, and in violation of Articles V, IX, X, and XII of the articles in addition to and amendments of the Constitution of the United States, and the said act of Congress is therefore unconstitutional, invalid, null, and void, for the reasons:

(a) That the only rights and duties vested by the Constitution of the United States in the National Government, [fol. 17] with regard to the appointment of the votes of presidential and vice presidential electors are by those provisions which authorize the Congress of the United States to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificate of their votes shall be opened by the president of the Senate in the presence of the two Houses of Congress, and the votes shall then be counted. (Constitution, Art. II, sec. 1, Amendments, Art XII). There being no constitutional authority for the attempted exercise of legislative power by Congress, the Federal corrupt practices act upon which the indictment is based is therefore unconstitutional, in so far as it relates to presidential and vice presidential electors.

(b) Presidential electors are State officers. Sec. 1, Art. II, of the Constitution of the United States provides:

"Each state shall appoint in such manner as the Legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in Congress." The authority to provide for their appointment or selection and to enact laws with regard thereto is an exclusive function of the State legislatures; and the Federal corrupt practices act of February 28, 1925, which attempts to regulate contributions and expenditures made to influence the election of presidential and vice presidential electors violates the rights reserved to the States by sec. 1, Art. II, and XIIth amendment to the Constitution of the United States.

(c) Those provisions of the Federal corrupt practices act approved February 28, 1925, which attempt to regulate contributions and expenditures made to influence the election of presidential and vice presidential electors are violative of Art. IX of the amendments to the Constitution of the United States, which declares: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

(d) Those provisions of the Federal corrupt practices act approved February 28, 1925, which attempt to regulate contributions and expenditures made to influence the election of presidential and vice presidential electors are violative of Art. X of the amendments to the Constitution of the United States, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(e) The indictment, being based upon an unconstitutional statute, is a denial of due process of law guaranteed by Art. V of the amendments to the Constitution of the United States.

(f) That the said act of Congress is in violation of Art. V of the amendments to the Constitution of the United States because said act, if enforced against defendants, would deprive them of their liberty or property without due process of law.

(g) That by Art. II, sec. 1, of the Constitution, it is provided that each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal

to the whole number of Senators and Representatives to which the State is entitled in the Congress * * * and by said article the power of Congress in enacting legislation upon the subject is limited as follows: "The Congress may [fol. 18] determine the time of choosing the electors, and the Day on which they shall give their votes; which day shall be the same throughout the United States," and there is no provision in Article XII of the amendments to the Constitution which enlarges the power of Congress to enact legislation regulating the election of electors or the expenditures of money with reference thereto, nor can such power be implied.

(h) Because each count of the indictment fails to allege facts which show or set forth the commission of any offense or the violation of any valid or constitutional statute of the United States.

And for such other and further reasons as may be shown upon a hearing upon this demurrer.

Robert H. McNeill, H. W. Nice, Attorneys for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ADDITIONAL POINTS IN SUPPORT OF DEMURRER—Filed November 13, 1931

* * * * * * *

As additional reasons why the demurrer heretofore filed herein should be sustained, the defendants, by their counsel, say:

The indictment is insufficient to inform the accused of the nature and cause of the accusation against them as required by Art VI of the amendments to the Constitution of the United States and to afford due process of law as guaranteed by Art V of the amendments to the Constitution of the United States for the reasons:

a. In each and every count of the indictment, there is a failure to allege facts which show, or from which may be inferred, the commission of any offense against or the violation of the Federal corrupt practices act, or any other statute of the United States, which omissions are to matters

of substance, and not of form only, in that there is a failure o charge, (1) who constituted the alleged political committee; (2) to whom the alleged contributions were paid; (3) that the alleged contributions were ever received by the treasurer; (4) or that the treasurer ever had knowledge of any such alleged contributions.

b. In each and every count of the indictment, there is an attempt to allege a statutory offense, but in none of them is the language of the statute followed. It is alleged in each count of the indictment that "contributions of money were made by one E. C. Jameson of New York for said political committee," whereas sec. 244 of the Federal corrupt practices act approved February 28, 1925, and each subsection thereof which purports to provide for the filing of reports by treasurers of political committees with the Clerk of the House of Representatives requires the name and address of each person who has made a contribution to or for such committee. The mere allegation that contributions were made for said political committee without charging that the alleged contributions were made to and for the said political committee is wholly insufficient to charge that the alleged [fol. 19] contributions were ever received by the committee or the treasurer thereof.

c. Counts numbered 1, 3, 5, 7 are insufficient in that there is an attempt in each to charge the treasurer of a political committee with a willful violation of the Federal corrupt practices act of February 28, 1925, by failing to make report of alleged contributions, each of which offenses is a felony under sec. 252 (b). In each and every one of said counts, there is a failure to charge the treasurer with knowledge of the alleged contributions or to allege facts sufficient in law to charge her with knowledge of the alleged contributions, which is an essential element of the offense of the willful violation of the statute and which omissions are matters of substance and not of form only.

d. The attempts in counts numbered 3 and 4 to charge the failure to file reports of alleged contributions on the 5th day next preceding the election of November 6, 1928, state no offense. If there was any duty resting upon the treasurer of the "Headquarters Committee of Anti-Smith

Democrats" to file with the Clerk of the House of Representatives a report listing the contributions alleged in these counts, the duty to make such report arose between the 10th and 15th days preceding the election of November 6, 1928, which offenses are attempted to be charged in counts numbered 1 and 2. Subsection 244 (b) of the corrupt practices act expressly provides:

"The statements required to be filed by subdivision (a) shall be comulative during the calender year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward."

Under the above provision for comulative reports, the Government having attempted to charge in the first and second counts the failure of the treasurer of the committee to file between the 10th and 15th days before the election of November 6, 1928, with the Clerk of the House of Representatives a report listing the alleged enumerated contributions, can not charge as a distinct offense the failure to report to the Clerk of the House of Representatives on the 5th day preceding the election the identical contributions by name, address, amount, and date of each contributor as is undertaken to be charged in the third and fourth counts.

e. It is alleged in counts numbered 1, 2, 3, and 4 that it became and was the legal duty of the treasurer of said political committee to file with the Clerk of the House of Representatives a statement complete as of the day next preceding the date of the filing thereof, if it should be filed, containing the name and address of said E. C. Jameson, the person who made the aforesaid contributions for said political committee aforesaid, together with the amount and date of each of said contributions. The allegation of the duty on the part of the treasurer to file a report, followed by the repugnant allegation, "if it should be filed," renders these counts vague, indefinite, uncertain, and insufficient in law to acquaint the accused with the offense sought to be charged.

f. It is alleged in counts numbered 7, 8, 9, and 10 that it became and was the legal duty of the treasurer of said political committee to file with the Clerk of the House of

[fol. 20] Representatives a statement complete as of the day next preceding the date of the filing thereof, if filed, containing the name and address of said E. C. Jameson, the person who made the aforesaid contributions for said political committee aforesaid, together with the amount and date of each of said contributions. The allegation of the duty on the part of the treasurer to file a report, followed by the repugnant allegation "if filed," renders these counts vague, indefinite, uncertain, and insufficient in law to acquaint the accused with the offense sought to be charged.

g. Because the alleged overt acts numbered 1, 2, 3, and 4 set forth in the ninth count, viz, the filing by the defendant Ada L. Burroughs, as treasurer of said political committee with the Clerk of the House of Representatives, of "a certain written report" on each of four respective dates, to wit: October 30, 1928, November 3, 1928, January 2, 1929, and February 15, 1929, "purporting to show receipts and disbursements" from September 1, 1928, through October 25, 1928, from July, 1928, to January 1, 1929, from January 1, 1929, to February 11, 1929; the foregoing allegations are the conclusions of the pleader without the allegation precedent facts justifying such conclusions that the aforesaid reports "purported to show receipts and disbursements."

h. Because the ninth count contradicts the first, third, fifth, and seventh counts, which are incorporated in said ninth count as parts of the said ninth count, in this respect, that in each of the first, third, fifth, and seventh counts it is alleged that there was a failure to file with said Clerk, in the District of Columbia "any such statement whatever, pertaining to said contributions, containing such information" whereas in each of the first four overt acts, it is alleged that reports were filed on the dates aforesaid and said reports are set forth in said ninth count.

i. Because the items in said overt acts numbered 6 and 7 in said ninth and tenth counts, viz, that the payments of $2,000 and $832.50 respectively, on October 23, 1928, by defendant James Cannon, jr., to said political committee do not correspond with any of the amounts listed in any of the counts and they were not included in the several reports made by defendant Ada L. Burroughs to the Clerk of the House of Representatives as alleged in overt acts numbered 1, 2, 3, and 4, inclusive, in said ninth and tenth counts.

j. Because the tenth count contradicts the second, fourth, sixth, and eighth counts in this respect: That in each of the said second, fourth, sixth, and eighth counts it is alleged that there was a failure to file with said Clerk, in the District of Columbia, "any such statement or any statement whatever, pertaining to said contributions, containing any such information" whereas in respect to each of the first four overt acts it is alleged that the reports were filed on the dates aforesaid and are set forth in said tenth count.

k. Because the ninth and tenth counts charge a conspiracy to falsify a report of contributions alleged to have been received in the calendar year 1928 in the report filed February 14, 1929, whereas the statute does not require that the report for the first quarter of the year, due March 10, 1929, which said report of February 14, 1929, antici- [fol. 21] pated, show any contributions received during the preceding year.

Robert H. McNeil, Harry W. Nice, Attorneys for Defendants.

Nov. 13, 1931.

Service of copy accepted.

Leo. A. Rover, O'L.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OPINION ON DEMURRER TO INDICTMENT—
Filed February 15, 1932

* * * * * * *

Several counts of the indictment accuse the defendants, Ada L. Burroughs, treasurer of a political committee to influence election of presidential and vice presidential electors, and James Cannon, jr., as her accomplice, with violating the corrupt practices act by failing to file statements of certain contributions made for the committee. Other counts accuse the defendants with conspiracy to commit the offenses described in the counts mentioned above. Every count is grounded upon an alleged failure to report contributions made by one Jameson for the committee, rather than directly to it. There is no allegation as to whom any contribution was actually delivered by Jameson, or that

the recipient made any report or accounting to Burroughs, the treasurer, nor is it shown that she had knowledge thereof.

The defendants by demurrer challenge the constitutionality of those provisions of the corrupt practices act which relate to presidential and vice presidential electors; also the sufficiency of the indictment as a pleading. Among the latter objections it is contended that no offense has been stated because of the failure to allege as a fact that the Jameson contributions were reported and accounted for to Burroughs, treasurer, or that she had knowledge thereof. It is insisted that such an allegation is necessary because the true meaning and intention of section 244 of the act requires the treasurer of a political committee to report only such contributions as are received directly by him and those received by others which have been duly reported and accounted for to him; and further, at all events the indictment should show that the treasurer had knowledge of indirect contributions before being chargeable with a failure to include them in the statements which he must file under the law.

In my opinion these objections are well taken. A consideration of section 244, in the light of all other related provisions of the act, leads fairly to the conclusion that the legislative intention is to require the treasurer of a political committee to report only contributions received by him and those duly reported to or accounted for to him. Certainly it was not intended to hold one criminally responsible for failure to report a contribution of which he had no knowledge. This is a proposition advanced by the Government to which I can not assent. It calls for an unreasonable and harsh construction which is neither warranted by the nature of the act, its language, nor its intent. Given [fol. 22] such a meaning, a treasurer who had filed a statement honestly and correctly, revealing every contribution known to him, would nevertheless be liable to prosecution because of an inevitable omission of a contribution made for the committee to another of which he had no knowledge. No such unjust purpose can be attributed to this legislation.

Nor can I accept the alternative contention that those counts which charge a wilful failure by Burroughs to report contributions made for the committee impute to her knowledge of contributions received by another. The term "wil-

ful," as used in these counts, is merely an adoption of the word employed in section 252 to differentiate in the penalties between a purposed and intentional violation of the act and one occurring thoughtlessly or accidentally through inadvertance or mistake. The reasoning and authorities in support of these theories are, I think, based upon fundamental misconceptions.

In my judgment, for the reasons mentioned, all counts of the indictment as drawn fail to allege facts essential to constitute any criminal offense. The demurrer must, therefore, be sustained as to each count. An order will be entered accordingly.

As this action disposes of the indictment it becomes unnecessary to pass upon the constitutional question presented by the demurrer; nor would it, on reason and authority, be proper to do so.

Unavoidable conditions have precluded me from writing an opinion fully presenting my views in support of the foregoing conclusions. I have thought it better to dispose of the matter now upon this memorandum, which may later be supplemented by a more complete statement.

Dated February 12, 1931.

James M. Proctor, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

JUDGMENT—February 15, 1932

The court resumes its session pursuant to adjournment: Mr. Justice Proctor, presiding.

* * * * * * *

Come as well the attorney of the United States, as the defendants by their attorney Levi H. David, Esquire; whereupon the defendants' demurrer heretofore submitted to the court, is by the court sustained and the indictment is dismissed; and thereupon it is considered by the court that each of the said defendants go thereof without day, to which action of the court the attorney of the United States prays an exception, which is noted; whereupon the attorney of the United States notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the court.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed April 1, 1932

* * * * * * *

Now comes the United States, appellant herein, by Leo A. Rover, United States attorney, and assigns as error the following:

[fols. 23 & 24] 1. The court erred in holding that all counts of the indictment as drawn failed to allege facts essential to constitute any criminal offense.

2. The court erred in sustaining the demurrer to the indictment.

3. The court erred in entering the final order herein.

Leo A. Rover, United States Attorney. John J. Wilson, Assistant United States Attorney. James R. Kirkland, Assistant United States Attorney.

Service of a copy of the foregoing assignment of errors is acknowledged, this first day of April, 1932.

R. H. McNeill, Attorney for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed March 1, 1932

* * * * * * *

Now comes the United States, appellant herein, by Leo A. Rover, United States attorney, and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Indictment.
2. Demurrer.
3. Additional points of demurrer.
4. Memorandum opinion of the court.
5. Entry of judgment.
6. Notation of appeal.
7. Assignment of errors.
8. This designation.

Leo A. Rover, United States Attorney. John J. Wilson, Assistant United States Attorney. James K. Kirkland, Assistant United States Attorney.

Service of a copy of the foregoing designation of record acknowledged this 1st day of March, 1932.

Robert H. McNeill, by Geo. H. McNeil, Attorney for Defendants.

Clerk's certificate to foregoing transcript omitted in printing.

Monday, October 31st, A. D. 1932.

* * * * * * *

No. 5653

UNITED STATES, Appellant,

vs.

ADA L. BURROUGHS and JAMES CANNON, JR.

The argument in the above entitled cause was commenced by Mr. John J. Wilson, attorney for the appellant, and was continued by Messrs. R. H. McNeill and L. H. David, attorneys for the appellees, and was concluded by Mr. John J. Wilson, attorney for the appellant.

On motion the appellees are allowed to file additional authorities.

(Mr. Justice Robb did not sit in this case.)

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5653

UNITED STATES, Appellant,

v.

ADA L. BURROUGHS and JAMES CANNON, JR.

Appeal from the Supreme Court of the District of Columbia

Before Martin, Chief Justice, and Van Orsdel, Hitz, and Groner, Associate Justices

(Argued October 31, 1932. Decided May 15, 1933)

Leo A. Rover, United States Attorney, and John J. Wilson, James R. Kirkland, and Roger Robb, Assistant United States Attorneys, all of Washington, D. C., for appellant.

Robert H. McNeill and Levi H. David, both of Washington, D. C., and H. Woodward Winburn, of Greensboro, N. C., for appellees.

MARTIN, Chief Justice:

An appeal by the United States from an order of the Supreme Court of the District of Columbia sustaining a demurrer to an indictment charging a violation of the Federal Corrupt Practices Act of February 28, 1925 (ch. 368, title III, sec. 301 et seq., 43 Stat. 1053, 1070), incorporated in the U. S. Code as sec. 241 et seq., ch. 8, title 2.

The pertinent provisions of the act as set forth in title 2, U. S. Code, read as follows:

"Section 241. (c) The term "political committee" includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice-presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization.

"Section 242. *Chairman and Treasurer of Political Committee; Duties as to Contributions; Accounts and Receipts.*—(a) Every political committee shall have a chairman and a treasurer. No contribution shall be accepted, and no expenditure made, by or on behalf of a political committee for the purpose of influencing an election until such chairman and treasurer have been chosen.

"(b) It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

"(1) All contributions made to or for such committee;

"(2) The name and address of every person making any such contribution, and the date thereof;

"(3) All expenditures made by or on behalf of such committee; and

"(4) The name and address of every person to whom any such expenditure is made, and the date thereof.

"(c) It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure by or on behalf of a political committee exceed-

ing $10 in amount. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

"Section 243. *Accounts of Contributions Received.*—Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received.

"Section 244. *Statements by Treasurer Filed with Clerk of House of Representatives.*—(a) The treasurer of a political committee shall file with the Clerk between the 1st and 10th days of March, June, and September in each year, and also between the 10th and 15th days, and on the 5th day, next preceding the date on which a general election is to be held, at which candidates are to be elected in two or more States; and also on the 1st day of January a statement containing, complete as of the day next preceding the date of filing—

"(1) The name and address of each person who has made a contribution to or for such committee in one or more items of the aggregate amount of value, within the calendar year, of $100 or more, together with the amount and date of such contribution;

"(2) The total sum of the contributions made to or for such committee during the calendar year and not stated under paragraph (1);

"(3) The total sum of all contributions made to or for such committee during the calendar year;

"(4) The name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such committee, and the amount, date, and purpose of such expenditure;

"(5) The total sum of all expenditures made by or on behalf of such committee during the calendar year and not stated under paragraph (4);

"(6) The total sum of expenditures made by or on behalf of such committee during the calendar year.

"(b) The statements required to be filed by subdivision (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

"(c) The statement filed on the 1st day of January shall cover the preceding calendar year.

"Section 252. General Penalties for Violations.—(a) Any person who violates any of the foregoing provisions of this chapter, except those for which a specific penalty is imposed by section 208 of title 18, and section 251 of this title, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) Any person who willfully violates any of the foregoing provisions of this chapter, except those for which a specific penalty is imposed by section 208 of title 18, and section 251 of this title, shall be fined not more than $10,000 and imprisoned not more than two years."

The appellees, Ada L. Burroughs and James Cannon, Jr., were indicted by a grand jury of the District of Columbia for an alleged violation of section 244 of the foregoing act. The indictment is in ten counts. The first eight counts charge the defendants with violations of the act and the last two counts charge them with conspiracy to violate the same. In the first, third, fifth, and seventh counts the charge is made that the defendants willfully violated the statute. In the second, fourth, sixth, and eighth counts it it not charged that the offense was willfully committed. In the first conspiracy count the charge is made that the offense was willfully committed. In the second of these counts the word "willfully" is omitted from the charge. We shall take the first and second counts as illustrative of the first eight counts.

The first count charges that Burroughs from July 22, 1928, to March 16, 1929, was the treasurer of a certain political committee which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of Presidential and Vice Presidential electors in two States; that at divers times

during that period various contributions of money were made by one E. C. Jameson for said political committee, aggregating the sum of $58,000; that it thereafter, and during said period of time, to wit, between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which candidates and Presidential and Vice Presidential electors were elected in the several States of the United States, became and was the lawful duty of said Burroughs, as such treasurer of said political committee, to file with the Clerk of the House of Representatives of the United States a statement, complete as of the day next preceding the date of the filing thereof, if it should be filed, containing the name and address of said E. C. Jameson, the person who made said contributions for said political committee as aforesaid, together with the amount and date of each of said contributions. The indictment further alleges that during said period of time, and while she was treasurer of said political committee, said Burroughs unlawfully and feloniously did willfully violate section 244 of chapter 8 of title 2 of the United States Code aforesaid, by then and there unlawfully and feloniously willfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contribution, containing any such information; and that at and within the District of Columbia the appellee Cannon during said period of time, well knowing all the premises aforesaid, unlawfully and feloniously did willfully aid, abet, and procure the commission of the above-described offense on the part of said Burroughs, and so was then and there a principal in the commission of that offense.

The second count of said indictment contained the same allegations of facts as those contained in the first count, except for the omission of the words "feloniously and willfully" therefrom, charging only that the failure of Burroughs to file said statement was "unlawfully" done. The count, however, charged that Cannon unlawfully did willfully aid and abet Burroughs in the commission of the offense.

The appellees filed a demurrer to the indictment upon the grounds, first, that the Federal Corrupt Practices Act and section 244 thereof were and are unconstitutional; and, second, that the indictment is insufficient to inform the

accused of the nature and cause of the accusation against them and to afford due process of law as guaranteed by the Constitution of the United States.

The demurrer was submitted to the lower court and was sustained upon the second of the grounds therein set out.

The United States thereupon appealed from that decision to this court. The appellees then filed a motion in this court to dismiss the appeal upon the ground that under the Criminal Appeals Act (18 U. S. C., sec. 682) the appeal should have been taken directly to the Supreme Court of the United States, and consequently that this court was without jurisdiction to entertain it. However, in answer to interrogatories certified by us to the United States Supreme Court, this court was instructed that under section 935, D. C. Code, we possess jurisdiction over the several issues presented by the appeal. United States v. Ada L. Burroughs and James Cannon, Jr., Supreme Court of the United States, decided April 10, 1933.

The appellees contend that the sections of the Federal Corrupt Practices Act relating to Presidential electors, upon which the indictment is based, are unconstitutional for the reason that such provisions attempt to regulate the political activities pertaining to the appointment of the electors, whereas the Constitution confers upon the State legislatures the exclusive power of appointing Presidential electors, together with authority over all acts relating thereto except the time of choosing such electors. The appellees contend that there is no inherent or implied power in Congress to regulate the appointment of such electors or any other proceedings relating to them. In support of these propositions appellees cite McPherson v. Blacker, 146 U. S. 1; In re Green, 134 U. S. 377; Todd v. Johnson, 99 Ky. 548; Donelan v. Byrd, 118 Ky. 178; Mason v. State, 55 Ark. 529; United States v. Brewers Association, 239 Fed. 163; In re Opinion of Justices (1919), 118 Me. 552; In re Opinion of Justices (1921), 80 N. H. 595; Newberry v. United States, 256 U. S. 232.

We do not think that the decision of the present case depends upon the propositions advanced by appellees, inasmuch as section 244, supra, under which the indictment in this case is brought, does not attempt to interfere in any manner with the appointment of Presidential electors, nor to control the official conduct or proceedings of such electors

when appointed. The section does no more than provide that in case of the voluntary organization of political committees which accept contributions or make expenditures for the purpose of influencing or attempting to influence the election of Presidential and Vice Presidential electors, it shall be necessary that a public statement be made in a prescribed manner showing the amount of money received and expended by such committee for such purpose. No attempt is thereby made to prescribe any penalty for the commission or omission of any act upon the part of the Presidential electors themselves, nor to impose any duty upon them. Nor does the act undertake to regulate the action or proceedings of such committees in respect to the collection or distribution of funds nor any other activity designed to aid in electing or defeating any Presidential electors. The section simply requires that an account of such collections and distributions shall be made public. The national importance of such publicity is obvious. It should be remembered that the duty rests upon the Senate and House of Representatives to aid in counting the electoral votes, and also a contingent duty, which is potentially present in the election of every President, namely, the ultimate power reposed in the House of Representatives to elect the President, and the power reserved in the Senate to elect the Vice President, in the event of certain contingencies prescribed by the twelfth amendment to the Constitution.

The constitutional authority for the enactment by Congress of such legislation as is herein involved is derived from article I, section 8, clause 18, of the Constitution, sometimes called the "implied power clause" or the "elastic clause", which reads as follows:

"The Congress shall have power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In Ex Parte Yarbrough, 110 U. S. 651, 666, Mr. Justice Miller, speaking for the court, said:

"That a governmental whose essential character is republican, whose executive head and legislative body are

both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. * * * The proposition that it has no such power is supported by the old argument, often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. * * * It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the Government or any branch of it by the Constitution. Article I, section 8, clause 18."

In Fairbanks v. United tSates, 181 U. S. 283, 287, the court said:

"We proceed upon the rule often expressed in this court that an act of Congress is to be accepted as constitutional, unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution. * * * Further, by the last clause of section 8, article I, Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department, or officer thereof.' This construed on the same principles vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution."

In United States v. Gettysburg Electric Railway, 160 U. S. 668, 680, the court said:

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the Government."

It is also contended by appellees that the indictment is fatally defective because it fails to allege that Burroughs as treasurer of the committee had knowledge of the Jameson contributions at any time named in the indictment. The lower court adopted this view and accordingly sustained the demurrer.

We are of the opinion that this was error. In the first, third, fifth, and seventh counts of the indictment it is stated that defendant Burroughs "unlawfully and feloniously did willfully violate" the requirements of the statute by "unlawfully and feloniously willfully failing to file" the required statement. These terms in the indictment sufficiently charge scienter on the part of the defendant.

In Potter v. United States, 155 U. S. 438, 446, the defendant was indicted under a criminal statute, providing that "any officer, clerk, or agent of any national banking association who shall willfully violate the provisions of an act entitled 'An act in reference to certifying cheques by national banks' * * * shall be deemed guilty of a misdemeanor * * *", the court, speaking of the word "willfully" when used in the act, said:

"It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'willful' in criminal statutes has been considered by this court. In Felton v. United States, 96 U. S. 699, it was said: 'Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing but a determination with a bad intent to do it or to omit doing it. "The word 'willfully' ", says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes means not merely 'voluntarily' but with a bad purpose." ' 20 Pick. (Mass.) 220. "It is frequently understood," says Bishop,

"as signifying an evil intent without justifiable excuse." ' Crim. Law, vol. 1, sec. 428.

In Spurr v. United States, 174 U. S. 728, which was a prosecution for "willfully violating" the banking act, the Supreme Court held that it was error for the trial court not to instruct the jury clearly that a "willful violation" was a violation with knowledge of the facts and a purpose to do wrong. In Foster v. United States, 256 Fed. 207, which was a prosecution under Penal Code, sec. 225, making it embezzlement for a postmaster to fail to remit or fail or refuse to surrender money-order funds on demand of an authorized agent of the Postmaster General, it was held that no specific intent was involved in the crime and that therefore it was enough for the indictment to allege that the defendant acted "willfully," the word "willfully" implying knowledge and a purpose to do wrong. In Johnson v. United States, 260 Fed. 783, the court held that "willfully means intentionally or knowingly".

In the light of these authorities, it is manifest that the allegation that Burroughs "did willfully violate" the statute by "willfully failing to file" a statement means that Burroughs acted with knowledge of the contributions and of her duty to report them.

In the second, fourth, sixth, and eighth counts of the indictment the term "willfully" does not appear, the charge being that the offense was "unlawfully" committed. However, the crime charged in these counts is purely statutory and the statute makes no mention therein of a specific intent. In such cases it is held that whether scienter is a necessary element of the crime, though not expressed in the statute, is a question of legislative intent to be answered by a construction of the statute, and that punishment for an illegal act done by one in ignorance of the facts making it illegal, is not necessarily contrary to due process of law. United States v. Balint, 258 U. S. 250; United States v. Behrman, 258 U. S. 280, 288.

The legislative purpose above referred to is clearly shown by sections 252 (a) and 252 (b), supra, whereby it is provided that any person who violates any of the provisions of the act shall be fined not more than $1,000 or imprisoned not more than one year, or both, whereas any person who willfully violates any of these provisions shall

be fined not more than $10,000 and imprisoned not more than two years.

These provisions indicate that Congress used the word "willfully" in the act as importing scienter. The difference in penalties provided thereby for a willful violation of the act as compared with a violation not willful, indicates that the former must be knowingly and intentionally done.

On the other hand, the offense may be unlawfully but not willfully committed, as in case the treasurer fails to file the required statement solely through ignorance of the law, or through carelessness, inadvertence, neglect, or similar cause. It will always be presumed, however, that the treasurer possesses knowledge of contributions which are made to or for the committee and the distributions made by it in the course of its activities. But if the treasurer in any instance should have no knowledge of a contribution and could not have acquired knowledge thereof by the bona fide exercise of reasonable care and diligence in the performance of the duties of the office, the failure to file a statement of such contribution would be neither willful nor unlawful.

It follows that the counts of the indictment sufficiently charge an offense under the statute. They are drawn in the language of the statute and are sufficient to enable the accused to know the nature and the cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution of the same offense. In the case of statutory offenses such as this, this is sufficient.

The order of the lower court sustaining the demurrer to the indictment is therefore reversed and the cause is remanded for further procedings not inconsistent herewith.

Mr. Justice Van Orsdel, dissenting:

I cannot agree with the opinion and judgment of the court in this case. The corpus delicti, or the body of the crime as laid in the statute, consists of a political committee, as defined therein, receiving funds, using them, and failing to make a detailed report thereof to the Clerk of the House of Representatives. The indictment fails to allege that any funds ever came into the possession of the committee or any person connected with the committee. Thus it appears that the first essential element leading to the

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possible commission of the crime is lacking, and without possession there can be no distribution; hence, in the absence of these two fundamental elements, the failure to report is not a crime, since to meet the requirements of the statute there is nothing to report. The essence of the crime is failing to report money that came into the possession of the committee, and from whom received, and funds paid out by the committee, and to whom such payments were made. In other words, the indictment fails to charge the crime defined in the statute, or any offense whatever. It is an elementary rule of criminal pleading, that, until the fact that the crime has been actually perpetrated and proved, in the manner alleged in the indictment, there can be no conviction.

Nowhere in the indictment is it charged that the treasurer of the committee had any knowledge of the existence of the funds in question. The mere allegation in the indictment that the money was paid for the committee without any averment as to whom it was paid, or that it ever reached the committee or anyone connected with the committee, falls far short of charging the crime laid in the statute, or of imputing guilty knowledge to the officer required to report, or to anyone else. Proof of the commission of the crime under this indictment, to sustain a conviction of defendants, is impossible, if the rules of evidence are observed. It undoubtedly is the law that where a crime is laid in the indictment and the defendant is charged with its willful commission, guilty knowledge may be implied; but this implication will never arise where the indictment, as in this case, fails to set out the elements essential to charge a crime.

A true copy. Teste:

——, Clerk Court of Appeals, D. C.

Monday, May 15th, A. D. 1933.

No. 5633, April Term, 1933

UNITED STATES, Appellant,

vs.

ADA L. BURROUGHS and JAMES CANNON, JR.

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the lower court sustaining the demurrer to the indictment is therefore reversed and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Chief Justice Martin, May 15, 1933.

Mr. Justice Van Orsdel dissenting.

Mr. Justice Robb took no part in the consideration or decision of this case.

[Endorsed:] No. 5,653. United States, appellant, v. Cannon & Burroughs, appellees. Motion for rehearing, &c. For appellees: R. H. McNeill, & Levi H. David. Court of Appeals, District of Columbia. Filed May 29, 1933. Henry W. Hodges, Clerk.

Saturday, June 10th, A. D. 1933.

No. 5653

UNITED STATES, Appellant,

vs.

ADA L. BURROUGHS and JAMES CANNON, JR.

On consideration of the motion for a rehearing or stay of mandate in the above entitled cause, It is ordered that

a rehearing be and it hereby is denied; and it is further ordered that the mandate be and it hereby is stayed under Rule 24 pending application for certiorari.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5653

UNITED STATES OF AMERICA, Appellant,

vs.

ADA L. BURROUGHS and JAMES CANNON, JR., Appellees

DESIGNATION OF RECORD

The Clerk of the Court of Appeals of the District of Columbia, in the preparation of the transcript of record on petition for certiorari of the above case to the Supreme Court of the United States, will include the following papers, namely:

1. Transcript of Record.
2. Memorandum; as to the argument of the case in the Court of Appeals.
3. Opinion of the Court of Appeals.
4. Dissenting opinion of Justice Van Orsdel.
5. Judgment.
6. Motion for Rehearing and stay of mandate, and orders of the Court on said motion.
7. This designation.
8. Clerk's certificate.

Robert H. McNeill, Investment Bldg., Attorney for Appellees, Ada L. Burroughs and James Cannon, Jr.

[Endorsed:] No. 5653. United States of America, appellant, vs. Ada L. Burroughs, and James Cannon, Jr., appellees. Designation of record. Robert H. McNeill, 700 Investment Bldg. Court of Appeals, District of Columbia. Filed Jul. 10, 1933. Henry W. Hodges, Clerk.

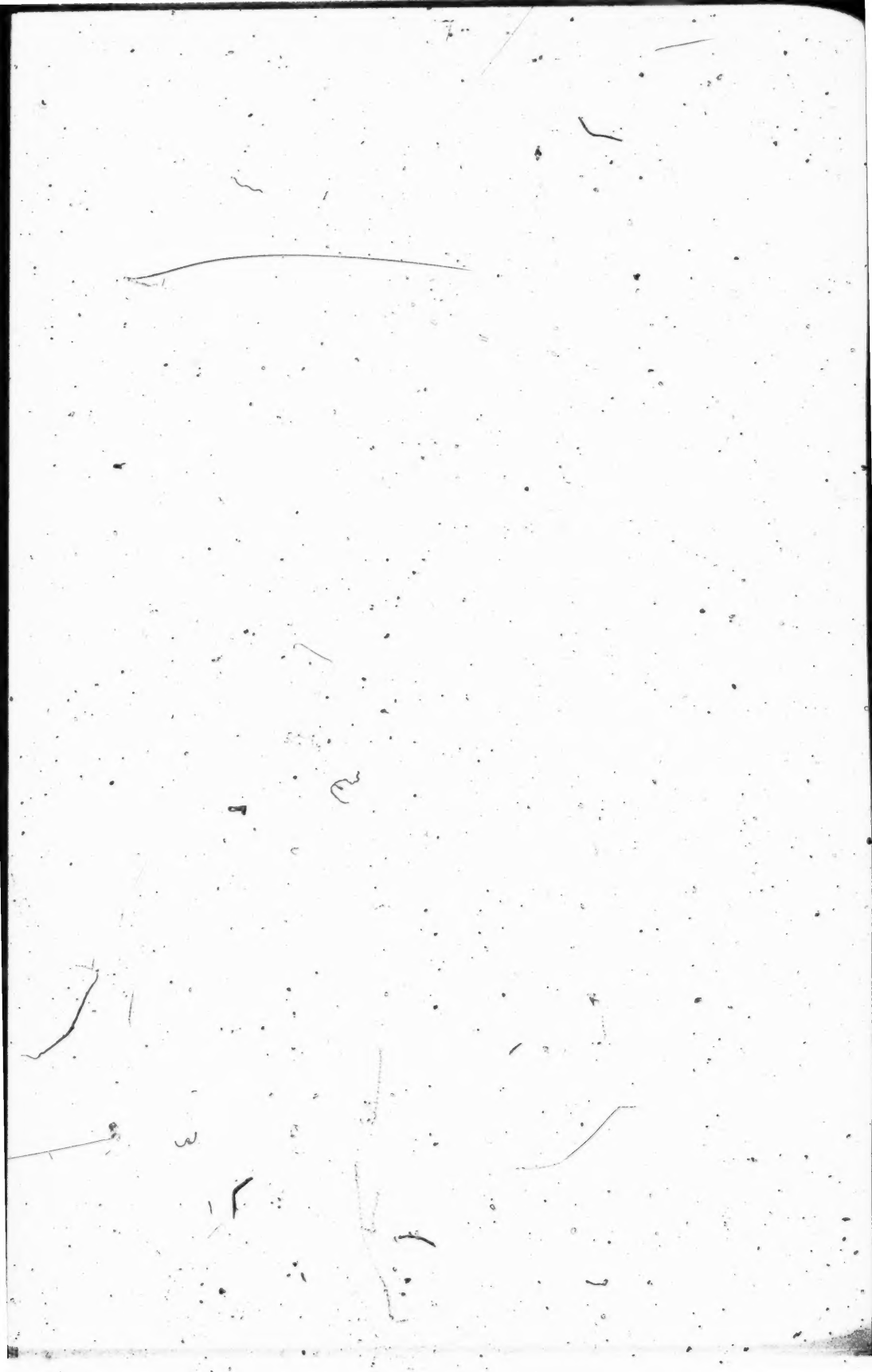
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the fore-

going printed and typewritten pages, numbered from 1 to 53, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of United States, appellant, vs. Ada L. Burroughs and James Cannon, Jr., No. 5653, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 11th day of July, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)



[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted, and the case is advanced and assigned for argument on Monday, December 4, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4118)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. _____

ADA L. BURROUGHS, AND JAMES CANNON, JR.,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the District of Columbia.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

PART I.

I.

The petitioners herein deeming themselves aggrieved by a decision of the Court of Appeals of the District of Columbia in a case in which they were the appellees and the United States of America was the appellant respectfully petition your Honorable Court to grant a writ of

certiorari for the review of said decision and judgment and for reasons why such writ of certiorari should be granted respectfully show the following.

II.

History of the Case

The case is one of first impression arising under the sections of the Federal Corrupt Practices Act of February 28, 1925, relating to contributions and expenditures made for the purpose of influencing the election of presidential electors in two or more states; requiring political committees to be appointed and the treasurer thereof to file reports with the Clerk of the House of Representatives.

Petitioner Ada L. Burroughs, as treasurer of a political committee, known as the Headquarters Committee Anti-Smith Democrats, is charged in the indictment (R. p. 1) returned by a grand jury of the District of Columbia, under the Federal Corrupt Practices Act of February 28, 1925 (U.S.C. Title 2, Chap. 8), with failure to file with the Clerk of the House of Representatives of the United States written reports of contributions alleged to have been made by one E. C. Jameson for said political committee. Petitioner James Cannon, Jr., is charged, in each count, with aiding and abetting petitioner Burroughs in failing to file such reports. It is charged that the money was contributed for the purpose of influencing and attempting to influence the election of Presidential and Vice-Presidential electors in two states.

The indictment contains ten counts (R. p. 1). The 1st, 3rd, 5th, and 7th counts charge the petitioners with feloniously failing to file the reports on the different dates specified in the statute.

The 2nd, 4th, 6th and 8th counts charge the petition-

ers with unlawfully failing to file reports on the respective dates specified in the statute.

The 9th count charges the petitioners with conspiring to commit the substantive alleged felonies charged in the preceding 1st, 3rd, 5th and 7th counts by failing to file the reports on the dates specified, while the 10th count charges a conspiracy to commit the substantive misdemeanors charged in the preceding 2nd, 4th, 6th and 8th counts by failing to file reports on the dates specified.

In no one of the ten counts of the indictment is any allegation that any contribution of money was made to either of the petitioners or to the said political committee or to any agent of the committee. Nor does any count contain an allegation that either defendant had knowledge of any contribution.

The indictment charges indirect contributions by one, E. C. Jameson, for said political committee, but fails to allege that the said Jameson contributions were reported or accounted for to said Burroughs, the treasurer of said political committee, or that she had knowledge thereof.

Petitioners demurred to the indictment on the grounds that the sections of the Federal Corrupt Practices Act upon which the indictment is based are unconstitutional insofar as they attempt to require reports of contributions and expenditures made to influence the election of Presidential and Vice-Presidential electors in the several states, this power being reserved exclusively to the states, under Sec. 1, Art. II of the Constitution of the United States; also that the provisions of the act are violative of the rights reserved to the people or to the states under the IX, X and XII amendments to the Constitution of the United States. Further grounds of demurrer were that the indictment failed to state any offense under the statute, properly construed. More specifically, that there was a failure

to allege facts which show, or from which may be inferred, the commission of any offense against or violation of the Federal Corrupt Practices Act, or any other Federal statute, in that there was a failure to charge (1) who constituted the alleged political committee; (2) to whom the alleged contributions were paid; (3) that the alleged contributions were ever **received by the treasurer**; and (4) that the treasurer ever **had knowledge** of any such contributions (R. pp. 16-21).

After argument in the Supreme Court of the District of Columbia a memorandum opinion was filed and judgment entered (R. pp. 21, 22) sustaining the demurrer. The court did not pass upon the constitutional questions raised but held that the indictment failed to charge any offense under the statute as construed by it.

The United States noted an appeal to the Court of Appeals of the District of Columbia (R. P. 22). Petitioners filed a motion to dismiss for want of jurisdiction on the ground the appeal should have been taken directly to this court under the Criminal Appeals Act (Sec. 682 Title 18 U. S. Code) which motion was overruled. Later after the case had been fully argued upon the merits, the Court of Appeals of the District of Columbia under section 239 of the Judicial Code, certified the question of its jurisdiction of the appeal to this court. In an opinion and judgment entered April 10, 1933 (United States vs. Burroughs, No. 683, October Term, 1932, not yet officially reported), this court answered and held that the Court of Appeals did have jurisdiction, whereupon that court in an opinion concurred in by three Justices, one Justice dissenting, and one having recused himself, reversed the decision and judgment of the Supreme Court of the District of Columbia and entered judgment remanding the case for trial (R. p. 34). Petition for rehearing (R. p. 37) being denied (R. p. 38).

III.

Points of Law Involved

The principle contentions made by the petitioners in the Court of Appeals of the District of Columbia are set forth in the grounds of the demurrer (R. p. 16).

I. The provisions of the Federal Corrupt Practices Act relating to Presidential electors are unconstitutional. The power to appoint presidential electors and to regulate the acts of citizens affecting their appointment is by the Constitution, Art. 11, Sec. 1, reserved to the states.

II. Even if the Federal Corrupt Practices Act be constitutional the indictment is insufficient to charge an offense under it since it merely alleges contributions "for the committee" without alleging to whom made, that they were accepted by the committee, or that the treasurer had knowledge thereof.

IV.

Reasons Why Writ Should Be Granted

A. The case involves a constitutional question of national importance viz., the power of Congress to regulate the acts of citizens attempting to influence the election of presidential electors. This has long been the subject of discussion and consideration by committees of Congress.

B. The case is one of first impression arising under the sections of the act relating to presidential electors.

C. The Court of Appeals has not given effect to applicable decisions of this Court.

D. Even should the act be constitutional the question of its construction with respect to the responsibility of the treasurers of political committees is of

equal public importance. In this case five Judges have construed the act, one Justice of the Supreme Court of the District of Columbia and one Justice of the Court of Appeals held the indictment did not state an offense under the act properly construed. Three Justices of the Court of Appeals have held to the contrary.

E. The law on this subject should be definitely settled for the entire country.

V.

The Facts and the Law of the Case

Only the sections of the Corrupt Practices Act of February 28, 1925, relating to presidential electors are involved in the case. The present Federal Corrupt Practices Act was enacted by Congress following the decision of this court in Newberry v. United States, 256 U. S. 232, holding the former act unconstitutional. It marks the first attempt by Congress to regulate the acts of citizens in connection with campaigns for the election of Presidential electors, prior legislation on the subject (aside from the act of January 26, 1907, relating to corporations) having been confined to acts affecting the election of members of Congress for which express authority was conferred by Article 1, Sec. 4 of the Constitution but which this court held in the Newberry case supra, did not confer any implied power to regulate primaries at which candidates for Congress are nominated.

Petitioners contend that the Constitution of the United States, Art. II, Sec. 1, expressly commits to the Legislatures of the several States the power of appointment of Presidential electors. It reads:

> "The executive power shall be vested in a President of the United States of America. He

shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. * * *

"The Congress may determine the Time of Chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

This right was assured by the IX and X Amendments and retained in the XII Amendment. This power of the State Legislature is full, complete and plenary. Where the framers of the Constitution intended that Congress should have any authority with respect to Presidential electors they provided for it in express terms as in Art. II, Section 3, to fix the "time of choosing and the day on which they shall give their votes" which is required to be the same throughout the United States.

This Court has settled that where the Legislature has provided for the election of presidential electors by popular vote of the people of a state it is nevertheless an "appointment" within the meaning of Art. II, Sec. 1, of the Constitution. McPherson v. Blacker, 146 U. S. 1. Acts of citizens influencing their selection at a popular election, affect their "appointment" which is a function expressly and specifically committed to the states. Fitzgerald v. Green, 134 U. S. 377. The elastic clause, Art. I, Sec. 8, clause 18, relied upon by the majority opinion of the Court of Appeals cannot give rise to an implied power to regulate a function vested by the Constitution in the States nor to punish

acts of citizens affecting the discharge of a constitutional prerogative belonging exclusively to the States.

The statute and the indictment in the instant case deal only with acts influencing the appointment of presidential electors before the individual has become an elector and at a time when the whole subject of the appointment and of acts affecting it is within the exclusive power of the State. There is no power in Congress to regulate the holding of elections except where that power is expressly conferred by the Constitution as in the case of Members of Congress under Art. I, Sec. 4, conferring authority to alter state regulation on that subject.

There is likewise no power to police or regulate the acts of citizens in connection with elections generally. The power to police the acts of citizens is confined solely to those elections which the Constitution empowers Congress to regulate, as e. g., the election of Members of Congress. Even where such express power is conferred this court has held it is not to be extended by implication (Newberry v. United States, supra).

The majority opinion of the Court of Appeals of the District of Columbia fails to point out any provisions of the Constitution authorizing Congress to regulate elections at which the people of the state, pursuant to an act of the Legislature, select the electors who are to cast the vote of the state for President or any section of the Constitution authorizing Congress to police the acts of citizens engaged in the function.

It bases its decision upon the so-called elastic clause of the Constitution Art. I, Sec. 8, clause 18, conferring upon Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and holds that the duty resting upon the Senate and House of Representatives to elect the President when no candidate has the

majority in the electoral college is adequate to sustain the act in question.

It is respectfully submitted that the majority of the Court of Appeals of the District of Columbia erred in holding that the elastic clause of the Constitution was adequate to confer legislative authority upon Congress with respect to a matter which the Constitution in express terms has committed to the states.

It is further contended that the Court of Appeals erred in failing to apply the principles of law announced by this court in McPherson v. Blacker, 146 U. S. 1, wherein it was held that the word "appoint" as used in the Constitution with respect to Presidential electors was sufficient to include a popular election at which Presidential electors were voted for. Also, the decision of this Court in Fitzgerald v. Green, 134 U. S. 377, wherein the right of the state to punish a citizen for acts affecting the election of presidential electors was established. In that case this court declared:

> "Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State Legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of representatives in Congress. Constitution Art. I, Sect. 2, 3."

Also, the principle laid down by this court in Newberry v. United States, supra, wherein it was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4."

The majority opinion of the Court of Appeals also ignores the precedent established by the Electoral Commission in the Hayes-Tilden contest in which the precise question was the power of the Congress in the discharge of its duty in counting the electoral vote to go behind the Commission issued by state authorities and inquire into acts of citizens affecting election of presidential electors. In those cases it was held no such authority existed. (Hinds Precedents of the House of Representatives, Vol. 3, Sec. 1977, p. 285.)

It also overlooked the report of the select committee of the Senate made to the 72nd Congress after the indictment and demurrer in the instant case was filed, in which the committee reported a bill for an entire new Corrupt Practices Act, stating that it marked a departure in principle from the present law. (S. Rep. No. 20 accompanying S. 2316, 72nd Cong. page 977 Cong. Rec.)

VI.

The Majority Opinion Misconstrues the Statute

The question of statutory construction involved upon demurrer to the indictment was whether Congress intended by the Federal Corrupt Practices Act of 1925, to hold the treasurer of a political committee criminally liable for failing to report to the Clerk of the House of Representatives indirect contributions, not to the committee, but "for the committee" without any allegation that the contribution was ever received, or accepted by the committee or any agent thereof or that the treasurer had knowledge of the contribution.

The contention of petitioners is that the Federal Corrupt Practices Act of 1925, in Sec. 241 (c) Title 2 U. S. C. defines a political committee as one which accepts contributions for the specified political purpose.

Contributions are then divided into two classes: 1st. Direct contributions, those made directly to the committee. No such contribution is charged in this case. 2nd. Indirect contributions, those made for the committee. The distinction between direct and indirect contributions is clearly made in Secs. 242, 243, and 244. Sec. 242 requires that before contributions are accepted a political committee shall be appointed, which is required to have a chairman and treasurer. It makes it the duty of the treasurer of a political committee to keep a detailed and exact account of all contributions made to or for such committee. This is followed by Sec. 243, which defines the method by which indirect contributions, those made for the committee, are accounted for to the treasurer. Following this is Sec. 244 (upon which the indictment is based), defining the duties of a treasurer of a political committee with respect to the filing of reports of contributions with the Clerk of the House of Representatives. This section requires reports to be made of contributions: 1st, To the committee; 2nd, For the committee. Since Sec. 243 immediately preceding is the one which defines what is meant by a contribution "for the committee," the only logical and reasonable interpretation of the section is that the contributions "for the committee" which Congress intended that the treasurer should report are those accounted for to the treasurer as provided in Sec. 243.

Sec. 243 reads:

> "Accounts of contributions received. Every person who receives a contribution **for a political committee** shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

Contributions made for the committee which the treasurer is required to report are those which come into existence as provided in Sec. 243, and the duty of the treasurer to report with respect to such contributions is contingent upon whether there has been an accounting to the treasurer for such contributions, or other facts giving rise to the duty of the treasurer to demand an accounting. As to indirect contributions, therefore, it clearly never was the intention of Congress that the treasurer of a political committee should be indicted and prosecuted merely upon the bare allegation that some person made a contribution for the committee without alleging that the recipient accounted to the treasurer for the contribution or other facts which imposed the duty upon the treasurer to demand an accounting of the recipient of the contribution made for the committee.

It is plainly apparent from Sec. 243, that, as to indirect contributions, Congress intended that there should be an accounting to the treasurer of the political committee, and the duty of the treasurer to report cannot arise unless there is alleged and proved either that the party who received the funds accounted to the treasurer, or facts giving rise to the duty upon the part of the treasurer to demand an accounting of the recipient. Neither of these allegations is made in the indictment in the instant case. If the statute be construed to mean that the treasurer of a political committee can be held criminally liable, even to indictment for felony, for failure to report a contribution made for the committee without alleging that the contribution in question was ever accounted for to the treasurer, or other facts giving rise to a duty upon the part of the treasurer to demand an accounting, then such a construction would render the statute of doubtful constitutional validity.

Champlin Refining Co. v. Corporation Comm, 286 U. S. 210.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 89.

Under the theory held by the majority of the Court of Appeals respecting the criminal liability of the treasurer of a political committee to account for contributions not made to it but to others for it, it results that control as to liability to criminal prosecution would be removed entirely from the committee and be placed solely with persons in no way related to, or even known to the committee. If the construction contended for by the Government is correct, the liability of the treasurer of a political committee to prosecution would depend not upon the knowledge which imposes an obligation upon the treasurer to report, but alone upon whether someone made a contribution to any person for the committee, and on this latter theory the treasurer could be indicted even if such treasurer did not know of it.

Consider what would follow if such a construction were allowed to stand. The political enemies of a committee could make a contribution to a third person without its knowledge, render no accounting to the treasurer of the committee and if the treasurer failed to report it, secure his indictment and prosecution. Or a corporation, which is prohibited by law from making contributions, could make a contribution to a third person for a political committee, never account for it to the committee, or authorized or accepted by it, and the treasurer of the committee be subsequently indicted and prosecuted for failing to report a contribution which it never accepted and as a matter of law it could not accept. Or, if a person made a contribution to some one for a political committee, although the person receiving it was not authorized

to solicit funds, and the recipient pocketed the money and appropriated it to his own personal use, under the construction insisted upon by the Government the treasurer of the political committee could be indicted and prosecuted.

The majority opinion holds that the government may indict the treasurer of a political committee and place her upon trial upon the bare allegation that some one made a contribution for the committee, and this without alleging to whom the money was paid, that it was ever accepted by the committee or that she had knowledge of it.

Not only that, but the majority opinion declares, "It will always be presumed however, that the treasurer possesses knowledge of contributions which are made to or for the committee." Under such a construction of the statute the government upon trial if it proved the allegation of the indictment would be entitled to an instruction to the effect that the treasurer of a political committee is presumed to know of all contributions made "for the committee," although it had neither alleged nor proved that the contributions were received, or accepted, to whom they were made or that they were paid to any agent of the committee which is the very corpus deliciti of the offense. The responsibility of a treasurer of a political committee is to report only contributions accepted or used by the committee.

By a careful study of the majority opinion just quoted, creating a presumption of guilt, it will appear to the Court that in order to establish his innocence a defendant charged with crime must show a **bona fide exercise of reasonable care and diligence in the performance of the duties of the office.** Since good faith is a personal defense based largely upon the mental processes and the motives actuating the defendant, and since no one can explain those motives except

the defendant, and since no one else has knowledge of whether or not a given action was taken in good faith, the action of the Court in writing into the Corrupt Practices Act a requirement that the defendant must show his good faith by showing the exercise of reasonable care and diligence in the performance of the duties of his office, (i. e., in ascertaining when, by whom and how contributions were made to his committee,) amounts to a requirement that in order to show such good faith the defendant must take the stand and testify, whether or not any evidence had been adduced to show bad faith, breach of duty, or breach of obligation to report contributions. Otherwise, under the majority opinion, the trial Court might hold and charge that the **presumption of knowledge** written into the Corrupt Practices Act by the majority opinion was tantamount to being guilty, as charged, unless and until the defendant assumed the burden of proving his innocence and overcoming this presumption. To maintain this position, we submit, means an utter disregard of the fundamental presumption of innocence which belongs to every defendant and which attends him throughout the case.

This would be a direct violation of the rights of the defendant under the Vth amendment to the Constitution, reading as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself,** nor be deprived of life, liberty or property, **without due process of law;** nor shall private property be taken for public use, without just compensation."

Boyd v. United States, 116 U. S. 616.

The Corrupt Practices Act nowhere in express terms creates any prima facie presumption. If such presumption arises it grows out of judicial construction. That such a presumption is wholly unjustified and would be in direct disregard of the plain provisions of the act is clearly indicated by the fact that Sec. 243 provides the manner by which the recipient is to give to the treasurer of a political committee the information requisite for the making of reports and keeping the accounts respecting contributions made "for the committee." This shows the Congress recognized that a treasurer of a political committee would not at all times have knowledge of contributions made "for the committee" when such contributions are not made "to the committee" or an agent thereof. It declares:

> "Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution render to the treasurer a detailed account thereof."

The foregoing section of the Act unquestionably makes it the duty of the treasurer to demand an accounting of contributions made "for the committee" when the treasurer has knowledge of them, but it also provides for a situation where a contribution is made "for the committee" without the knowledge of the treasurer. In that case it is made the duty of the recipient within five days to account to the treasurer therefore.

A treasurer can, of course, demand an accounting only when he has knowledge of the contribution made "for the committee." Because of this Congress made provision for the situation which arises where the treasurer has no knowledge by making it the duty of the recipient to report within five days.

It is submitted, therefore, that in view of this clear statutory recognition of the fact that there are circumstances under which the treasurer may have no knowledge of a contribution made by some one "for the committee," there is no justification for the creation of a judicial presumption of knowledge under all circumstances.

In a campaign of nation-wide scope, such as is involved in the election of a President of the United States, it is absolutely impossible for the treasurer of a political committee to know of every instance when some individual citizen, may make a contribution "for the committee" or expend money "on its behalf." The presumption can reasonably arise only when it is shown that it is made to the committee or some agent thereof. Therefore, the construction of the act adopted by the majority of the Court of Appeals creating a presumption against the treasurer, it is submitted, falls within the class of an unreasonable presumption preferred to in McFarland v. American Sugar Refining Co., 241 U. S. 79, 86.

It is respectfully contended that Mr. Justice Van Orsdel in his dissenting opinion has correctly interpreted the statute, saying:

> "The **corpus delicti**, or the body of the crime as laid in the statute, consists of a political committee, as defined therein, receiving funds, using them, and failing to make a detailed report thereof to the Clerk of the House of Representatives. The indictment fails to allege that any funds ever came into the possession of the committee or any person connected with the committee. Thus it appears that the first essential element leading to the possible commission of the crime is lacking, and without possession there can be no distribution; hence, in the absence of these two fundamental elements, the failure to report is not a crime, since to meet the requirements of the statute

there is nothing to report. The essence of the crime is failing to report money that came into the possession of the committee, and from whom received, and funds paid out by the committee, and to whom such payments were made. In other words, the indictment fails to charge the crime defined in the statute, or any offense whatever. It is an elementary rule of criminal pleading, that, until the fact that the crime has been actually perpetrated and proved, in the manner alleged in the indictment, there can be no conviction."

Or as Mr. Justice Proctor of the Supreme Court of the District of Columbia said in his opinion sustaining the demurrer:

"A consideration of section 244, in the light of all other related provisions of the act, leads fairly to the conclusion that the legislative intention is to require the treasurer of a political committee to report only contributions received by him and those duly reported to or accounted for to him. Certainly it was not intended to hold one criminally responsible for failure to report a contribution of which he had no knowledge. This is a proposition advanced by the government to which I cannot assent. It calls for an unreasonable and harsh construction which is neither warranted by the nature of the act, its language, nor its intent.

"Nor can I accept the alternative contention that those counts which charge a **wilful** failure by Burroughs to report contributions made **for** the committee impute to her knowledge of contributions received by another. The term 'wilful,' as used in these counts, is merely an adoption of the word employed in section 252 to differentiate in the penalties between a purposed and intentional violation of the act and one occurring thoughtlessly or accidentally through inadvertence or mistake."

Even if the government were to prove every allegation made in this indictment it would not have established an offense under the act.

A certified copy of the entire record of said case, including the record in the Court of Appeals of the District of Columbia is hereby furnished. attached to and made a part of this application and marked exhibit "A" in compliance with Rule 38 of this Honorable Court.

Your petitioners are advised and believe that the judgment of the Court of Appeals of the District of Columbia in this case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provision of Section 240, Judicial Code.

Wherefore because of the said erroneous rulings of the Court of Appeals of the District of Columbia, as will be more fully expounded in the annexed brief, petitioners pray they be granted by this Honorable Court the writ of certiorari pursuant to the provisions of section 240 of the Judicial Code, that the writ be directed to the Court of Appeals of the District of Columbia; that on the return duly made to the writ and hearing of the case the judgment of the Court of Appeals of the District of Columbia herein be reversed.

Dated, Washington, D. C.
August 21, 1933.

ROBERT H. McNEILL,
Investment Building,
Washington, D. C.
Counsel for Petitioners.

CERTIFICATE OF COUNSELLOR

I, the undersigned do hereby certify that in my opinion the foregoing petition is well founded and that it is not interposed for the purpose of delay.

Dated, Washington, D. C.
August 21, 1933. ROBERT H. McNEILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. _____

ADA L. BURROUGHS, AND JAMES CANNON, JR.,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORATI.

PART II.

Petitioners propose to establish the following propositions:

1. The provisions of the Federal Corrupt Practices Act relating to presidential electors attempt to regulate political activities pertaining to their appointment.

2. The acts alleged in the indictment relate solely to attempts to influence their appointment.

3. The Constitution of the United States confers

upon the state the exclusive power of appointment of presidential electors and over all acts relating thereto **except the time of choosing** the electors.

4. The method of appointing presidential electors and the principle of the people acting by states was retained in the XII Amendment.

5. This Court has held that the XIVth Amendment did not take away from the state legislatures the exclusive power of appointing electors.

6. This Court has held that the term "appoint" in Art. II, Sec. 1, covers any method fixed by the state legislature, including a popular election at which the people vote for presidential electors.

7. This Court has conclusively settled the status of a presidential elector as a state officer, as respects both his appointment and attempts to influence his appointment.

8. The decisions of the state courts establish that the appointment of presidential electors is exclusively the function of the state and that, as to his creation, he is **a state officer.**

9. State, not Federal courts exercise jurisdiction to settle disputes regarding the manner of appointing presidential electors and acts relating thereto.

10. The IXth and Xth Amendments reserve to the states respectively or to the people all rights not expressly conferred upon the Congress by the Constitution.

11. There is no power in Congress to regulate elections generally:

a. Even as to members of Congress it is limited to "the times places and manner of holding elections for Senators and Representatives." The fixing of the qualifications of the voters, **as to them,** is reserved to the states.

b. The right of suffrage is controlled by the

states, exclusively, except as against discrimination.

12. In the absence of constitutional provision there is no authority in Congress to regulate the collateral acts of citizens influencing elections.

13. Text writers on constitutional law agree that the state legislature is possessed of plenary power with respect to the appointment of presidential electors and to regulate all acts relating thereto.

14. There is no inherent or implied power in Congress to regulate the appointment of presidential electors.

1. THE PROVISIONS OF THE FEDERAL CORRUPT PRACTICES ACT RELATING TO PRESIDENTIAL ELECTORS ATTEMPT TO REGULATE POLITICAL ACTIVITIES PERTAINING TO THEIR APPOINTMENT.

Sec. 241 (c) Title II U.S.C. of the Federal Corrupt Practices Act of 1925 defines the term "political committee," to include any committee which accepts contributions*** or makes expenditures **for the purpose of influencing or attempting to influence the election of***** presidential and vice presidential electors (1) in two or more states or (2) whether or not in more than one state if such committee*** (other than a duly organized state or local committee of a political party) is a branch or subsidiary of a national committee."

This Act, in so far as it applies to **presidential electors,** makes the duty of the treasurer of a "political committee" to file reports of contributions with the Clerk of the House of Representatives primarily contingent upon whether the contribution is accepted by the committee for the purpose of **influencing or attempting to influence the election of presidential or vice presidential electors,** and then upon whether the influ-

encing or attempting to influence the election of presidential electors is to be undertaken **in two or more states,** unless it is a branch or subsidiary of a national committee, in which event the treasurer is required to report contributions made for the purpose of influencing or attempting to influence the **election of presidential electors** within a single state. If the political committee happens to be that of a duly organized state or local committee of a political party, through which mediums vast sums of money are ordinarily spent in presidential campaigns, the statute exempts such committee from making any report whatsoever. It also does not apply to state and local committees of a movement which is **sectional** in character and not subsidiary to a **national** committee.

Every duty which the act attempts to require of a "political committee" has reference to acts done **before** a presidential elector comes into existence and deals solely with matters having to do with the appointment of an individual as an elector at a time when the matter is within the exclusive control of the state. The Constitution of the United States provides for the office of presidential elector but until an individual becomes a presidential elector by appointment in whatever method the state legislature may provide, the subject is wholly beyond any legislative control by Congress.

It is apparent that there is no purpose in the statute to affect electors after they actually function in that capacity. The Corrupt Practices Act differs from the regulations adopted by Congress, providing the mechanics for carrying into effect the mandates of the Constitution after the elector has been appointed, all of which carefully reserve to the states the exclusive power over the appointment of electors and all acts relating thereto. These are found in Title III of the United States Code, Chap. 1, which provides for the

machinery of recording the votes of the electors for President after these electors have been selected by the respective states, whereas this statute deals with a matter that is entirely confined to the period between the time the campaign began for their choice and their selection by the states.

2. THE ACTS ALLEGED IN THE INDICTMENT RELATE SOLELY TO ATTEMPTS TO INFLUENCE THEIR APPOINTMENT.

The gravamen of the charges against the defendants in each and every count in the indictment is the failure to report contributions made for a political committee **"for the purpose of influencing and attempting to influence" the election of presidential and vice presidential electors** or a conspiracy not to report contributions made for that purpose. There is no allegation that anything was done by the defendants at any time after an elector was appointed. The offense attempted to be charged, therefore, relates to matters done at a time when the whole subject was exclusively in the control of the state. Whatever authority, if any, Congress may possess over a presidential elector after he has been appointed, that question is not involved in this case, for the individuals whose names were on the ballots as candidates for appointment as presidential electors did not become electors until after their appointment as presidential electors.

See McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869, 13 Sup. Ct. Rep. 3; Fitzgerald v. Green, 134 U. S. 377, 33 L. Ed. 951, 10 Sup. Ct. Rep. 586.

3 THE CONSTITUTION OF THE UNITED STATES CONFERS UPON THE STATE THE EXCLUSIVE POWER OF APPOINTMENT OF PRESIDENTIAL ELECTORS AND OVER ALL

ACTS RELATING THERETO, EXCEPT THE TIME OF CHOOSING OF THE ELECTORS.

The provisions of the Constitution of the United States relating to presidential electors deal with several aspects of that subject with respect to which the legislative authority of Congress may be distinctly different. These are, first, their appointment; second, the casting of the electoral vote; third, the count of the vote by Congress; fourth, protection of the citizen of the United States against discrimination covered by the XIVth, XVth, and XIXth Amendments. The first stage is the choosing or appointment of the electors. The statute and the indictment in the instant case deal only with matters affecting this.

Art. II, Sec. 1, of the Constitution of the United States, provides:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.***
>
> "The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

The sole power conferred upon Congress by this section is the right to fix the "time of choosing" and "the day on which they shall give their votes," which is required to be the same throughout the United States. When the framers of the Constitution intended to confer upon Congress any right to legislate with respect to the selection of presidential electors they provided for it in express terms, as, e. g., the right to fix the

time of choosing. All of the details with respect to the mode of selection and the incidents relating thereto are left by the Constitution to the people of the states to be fixed as the legislature may determine.

The scrupulous care with which the rights of the people, acting by states, were safeguarded in the process of the selection of a President is shown in the provisions which fix the number of electors to be appointed from each state. Under Art. II, Sec. 1 of the Constitution, the number equals the whole number of Senators and Representatives to which the state may be entitled in the Congress." The Representatives are required to be apportioned according to population, but in the Senate each state has two members—the smallest state as many as the largest. The number of members of the electoral college to which any state is entitled is required to be computed not only upon the basis of population but upon that of equipollency of the states in the Senate. In the event of a failure of any candidate for President to receive a majority of the electoral votes and the House is required to elect, each state has one vote.

The intention to make the choice of President free from any Federal domination or control in the appointment of electors is shown also by the provision in Art. II, Sec. 1, "but no Senator or Representative, or Person holding an office of Trust or Profit under the United States, shall be appointed an Elector" and by the further requirement that they shall meet in their respective states to cast their ballots.

Congress by Act of March 1, 1792, Chap. 8, Sec. 1, 1 Stat. 239 (now carried in U.S.C.A. Title III, Chap. 1), fixed the time when electors should be appointed as follows:

> "Section 1. **Time of appointing electors.** The electors of President and Vice President shall be

appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

Having fixed the time Congress has exhausted all power conferred upon it by the Constitution with respect to the appointment of the electors, save to protect against the discriminations protected by the XIVth, XVth and XIXth Amendments, hereinafter described.

4. THE METHOD OF APPOINTING PRESIDENTIAL ELECTORS AND THE PRINCIPLE OF THE PEOPLE ACTING BY STATES WERE RETAINED IN THE XIIth AMENDMENT.

The tie vote in the electoral college in the contest between Mr. Jefferson and Mr. Burr in 1800, which threw the election of a President into the House of Representatives, threatened serious consequences and renewed discussion of the subject of the mode of electing the President. This resulted in the XIIth Amendment to the Constitution, ratified in 1804. **Thus once more, not only Congress but the legislatures of the several states as well as the people had their attention directed to the subject.** It is highy significant, therefore, that in framing the amendment, no change whatsoever was made affecting the exclusive power of appointment committed to the state legislature under the original Constitution, Art. II, Sec. 1. The changes related solely to the casting of the ballot by the electors, requiring them to vote upon distinct ballots for President and Vice President and changing in some respects the procedure by Congress in the event no candidate for President or Vice President received a majority of the whole number of electors appointed. The amendment reads:

"The Electors shall meet in their respective

states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors **appointed;** and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. **But in choosing the President, the votes shall be taken by states, the representation from each state having one vote;** A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors **appointed,** and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole num-

ber shall be necessary to a choice. But no person constitutionaly ineligible to the office of President shall be eligible to that of Vice President of the United States." (Heavy print ours.)

Two things in the amendment should be noted. (1) It retains the use of the word "appointed" in each instance where it refers to the selection of electors, the same term used in the original Constitution, conferring such power upon the state legislature; and (2) it retains the principle that if the election be thrown into Congress the vote shall be taken by states, each state having one vote. If the people had desired to give to Congress any supervisory power over the appointment of presidential electors this would have been the time and place where it could have been most easily made. But the original clause of Art. II, Sec. 1 is unaffected and the policy of exclusive power over appointment of electors remains in the state legislatures.

5. THIS COURT HAS SETTLED THAT THE XIVth AMENDMENT DID NOT TAKE AWAY FROM THE STATE LEGISLATURES THE EXCLUSIVE POWER OF APPOINTING ELECTORS.

The only other provisions of the Constitution of the United States which empower Congress to legislate with respect to presidential electors are those contained in the XIVth, XVth and XIXth Amendments designed to protect citizens of the United States from discrimination by the state, or state agencies, on account of race, color or previous condition of servitude or on account of sex and to insure the equal protection of the law. These amendments do not apply to the acts of individuals or groups of individuals, such as a committee referred to in the indictment in this case.

James v. Bowman, 190 U.S. 127, 23 Sup. Ct. Rep. 678, 47 L. Ed. 979; Civil Rights Cases, 109 U.S. 3, 3 Sup. Ct. Rep. 18, 27 L. Ed. 835.

When the people intended to confer legislative authority upon Congress under these amendments, they provided for it in **express** terms. The XIVth Amendment contains the following:

> "Sec. 2.*** But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.***
>
> "Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In each of these amendments (XIV, XV, XIX) the legislative authority of Congress **is restricted solely to the protection against the particular type of discrimination covered by the constitutional amendment, through action by the state.** And in each instance the amendment in **express** terms provides for the enactment of appropriate legislation by Congress to effectuate that purpose. That neither the XIVth nor the XVth Amendment in any way altered the exclusive power of the state legislatures to appoint presidential electors, except to insure against the type of discrimination with which each amendment deals is conclusively settled by the decision of this Court in McPherson v.

Blacker where the exact question was raised. The Court said: 146 U.S., 38.

> "We decided in Minor v. Happerset, 21 Wall. 162 that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the 14th Amendment, and that that amendment does not add to these privileges and immunities, but simply furnished an additional guaranty for the protection of such as the citizen already has; that at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the state; nor was it at the time of the adoption of the Constitution; and that neither the Constitution nor the 14th Amendment made all citizens voters. * * * (146 U. S., 38).
>
> **"The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States.** The first has not been granted or secured by the Constitution of the United States, but the last has been. United States v. Cruikshank, 92 U. S. 542; United States v. Reese, 92 U. S. 214. * * *
>
> "If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made. **Unless the authority vested in the legislatures by the second clause of section 1 of article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect."** (146 U. S., 40.) (Heavy print ours.)

The XIXth Amendment is in the precise terms of the XVth with the substitution of the word "sex" for the words, "Race, color or previous condition of ser-

vitude." It has been repeatedly held that the XVth Amendment does not confer upon colored men the right of suffrage, it only forbids discrimination. United States v. Reese, 92 U. S. 214, 23 L. Ed. 563. Therefore, as to acts relating to the choosing of electors, save for those matters to which the Constitution expressly refers, the states are possessed of plenary powers which by the very nature of the subject dealt with must be exclusive of any right of legislation by Congress.

6. THIS COURT HAS HELD THAT THE TERM "APPOINT" IN ART. II, SEC. 1, COVERS ANY METHOD FIXED BY THE STATE LEGISLATURE INCLUDING A POPULAR ELECTION AT WHICH THE PEOPLE VOTE FOR PRESIDENTIAL ELECTORS.

In McPherson v. Blacker, (supra), (1892) the precise point was definitely and conclusively settled. Mr. Chief Justice Fuller, in delivering the unanimous opinion of the court, said, with respect to the exclusive right of the state legislature of Michigan to control the method of appointment of presidential electors under the act of that state of May 1, 1891:

> "It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination. (146 U. S. at p. 27.)

Again the court declared:

> "If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive

why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. IN OTHER WORDS, THE ACT OF APPOINTMENT IS NONE THE LESS THE ACT OF THE STATE IN ITS ENTIRETY BECAUSE ARRIVED AT BY DISTRICTS, FOR THE ACT IS THE ACT OF POLITICAL AGENCIES DULY AUTHORIZED TO SPEAK FOR THE STATE, AND THE COMBINED RESULT IS THE EXPRESSION OF THE VOICE OF THE STATE, A RESULT REACHED BY DIRECTION OF THE LEGISLATURE, TO WHOM THE WHOLE SUBJECT IS COMMITTED." (146 U. S. at p. 25.)

And at p. 27:

"The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the LEGISLATURE EXCLUSIVELY TO DEFINE THE METHOD OF EFFECTING THE OBJECT."

And the court at p. 34 quoted approvingly a report made by Senator Morton, chairman of the Senate Committee on Privileges and Elections on the 28th of May, 1874, in which it was said:

"The appointment of these electors is thus placed ABSOLUTELY AND WHOLLY WITH THE LEGISLATURES OF THE SEVERAL STATES. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the su-

preme court of the state or any other agent of its will, to appoint these electors. THIS POWER IS CONFERRED UPON THE LEGISLATURES OF THE STATES BY THE CONSTITUTION OF THE UNITED STATES, AND CANNOT BE TAKEN FROM THEM OR MODIFIED BY THEIR STATE CONSTITUTIONS ANY MORE THAN CAN THEIR POWER TO ELECT SENATORS OF THE UNITED STATES. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people there is no doubt of the right of the legislature to resume the power at any time, FOR IT CAN NEITHER BE TAKEN AWAY NOR ABDICATED." Senate Rep. 1st Sess. 43d Cong. No. 395.

The Court further said at p. 35.

"IN SHORT, THE APPOINTMENT AND MODE OF APPOINTMENT OF ELECTORS BELONG EXCLUSIVELY TO THE STATES UNDER THE CONSTITUTION OF THE UNITED STATES."
* * *

And at p. 36:

"BUT WE CAN PERCEIVE NO REASON FOR HOLDING THAT THE POWER CONFIDED TO THE STATES BY THE CONSTITUTION HAS CEASED TO EXIST BECAUSE THE OPERATION OF THE SYSTEM HAS NOT FULLY REALIZED THE HOPES OF THOSE BY WHOM IT WAS CREATED. Still less can we recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."

See also opinion below in the Supreme Court of

Michigan, 92 Mich. 377, 52 N. W. 469, 16L. R. A. 475, 31 Am. St. Rep. 587.

Re Opinion of the Justices of the Supreme Judicial Court of Maine, 118 Me. 552, 107 Atl. 705, 5 A.L.R. 1407, 1408 (1919), wherein that court said, regarding the authority of the state legislature in the matter of appointment of presidential electors:

> "The word 'appoint' as employed in subdivision 2 has been interpreted, to be sufficiently comprehensive to include the result of a popular election and to convey the broadest powers of determination." McPherson v. Blacker, 146 U. S. 1, 27, 36 L. Ed. 869, 874, 13 Sup. Ct. Rep. 3.
>
> "The language of sec. 1 subd. 2 is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states. 'Each state shall appoint in such manner as the legislature thereof may direct' are the significant words of the section, and their plain meaning is that each state is thereby **clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the Federal government,** except, of course, in case of attempted discrimination as to race, color, or previous condition of servitude under the 15th Amendment. The clause, 'in such manner as the legislature thereof may direct,' means simply that the state shall give expression to its will, as it must of necessity, through its lawmaking body, the legislature. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen." (Heavy print ours.)

The scope of authority of the state legislature over the matter of appointment of electors, with the single exception of fixing the time, is also well illustrated by

the decision of the Supreme Court of Tennessee in Vertrees v. State Board of Elections, 141 Tenn. 645, 214 S. W. 737. Prior to the XIXth Amendment to the Federal Constitution, the legislature of Tennessee by Acts 1919, Chap. 139, conferred a limited right of suffrage upon women, authorizing them to vote for presidential and vice presidential electors and certain municipal officers. The contention was made that the act was in violation of the state constitution. In sustaining the statute the court said (p. 739-740, 214 S. W.):

> "Since municipal officers are not referred to in the Constitution, and there is no provision in that instrument as to the manner of their selection, and since presidential and vice presidential electors are not referred to in the Constitution, and no mention is made as to the manner of their selection (and this doubtless could not be regulated by the state constitution), the conclusion inevitably follows that, under the provisions of section 4 of article 7 of the Constitution, the election of such officers 'shall be made in such manner as the Legislature shall direct.' It is thus competent for the Legislature to provide that such officers may be selected by other instrumentalities, or the legislature itself may select them. THE LEGISLATURE PERHAPS MIGHT CONFER THE POWER TO SELECT SUCH OFFICERS UPON THE WOMEN ALONE. THERE IS NO LIMITATION OF THE AGENCIES IT MAY EMPLOY." (Capitals ours.)

In State ex rel Barker v. Bowen, 8 S. C. 382, a case that grew out of the contest between Hayes and Tilden electors in South Carolina in 1876, the South Carolina Supreme Court said (p. 387):

> "There is nothing in the Constitution or laws of the United States that can be of the least service in determining which of the parties to the suit were

duly elected to the office in question. The only feature of the general proceeding to appoint electors that Congress is authorized by the Constitution to control is the day on which they shall be appointed—Art II. Authority to determine the mode of appointment is conferred by the Constitution (Art. II Sec. 1) on the legislature of the state. NO LIMITATION OR RESTRICTION AS TO THE MODE OF APPOINTMENT OR CERTIFYING THE FACT OF APPOINTMENT IS IMPOSED UPON THE STATE LEGISLATURE." (Capitals ours.)

The instant case does not involve any question of the power of Congress to legislate after the elector has been appointed, or of the right of Congress to judge of the regularity of votes cast for an elector when counting the electoral vote as required by the Constitution, upon which subject there is a conflict of authority. But in so far as these questions may be regarded as having been decided, the weight of authority supports the conclusion that Congress may not go behind the certificate of an elector issued by state authorities. The Electoral Commission appointed in 1877 to settle the dispute between the Hayes-Tilden electors found:

"There exists no power in this Commission and there exists none in the two houses of Congress in counting the electoral vote, to inquire into the circumstances under which the primary vote for electors was given." Hinds Precedents, House of Representatives, Vol. 3, Sec. 1977.

On this Commission were five Justices of the United States Supreme Court, five members of the House, and five from the Senate. Therefore, even as to matters arising after an elector has been appointed it is clearly indicated that Congress has no power except as provided in the Constitution itself.

7. THIS COURT HAS CONCLUSIVELY SETTLED THE STATUS OF A PRESIDENTIAL ELECTOR AS A STATE OFFICER, AS RESPECTS BOTH HIS APPOINTMENT AND ATTEMPTS TO INFLUENCE HIS APPOINTMENT.

This Court has had occasion to decide cases involving two aspects of the power conferred upon the state legislatures to appoint presidential electors under Art. II, Sec. 1 of the Constitution of the United States. One case dealt with the nature and scope of the power conferred upon the state legislature in selecting the mode of appointment. In McPherson v. Blacker, (supra) there was involved the validity of an act of the Michigan Legislature of May 1, 1891, which changed the method of appointment of presidential electors theretofore employed in the state and provided that there should be elected by the people one elector and an alternate elector in each of the twelve Congressional districts into which the state was divided, and an elector and an alternate elector-at-large to be elected respectively by the people in two districts into which the state was divided, known as the eastern and western districts. It was contended that the act of the legislature was in violation of the Constitution since appointment by districts was not an appointment by the state because all its citizens otherwise qualified were not permitted to vote for all of the presidential electors and were thus deprived of privileges and immunities guaranteed citizens of the United States by the XIVth Amendment. This case, therefore, went to the very heart of the question of the nature and completeness of the power vested in the state legislature to provide for the appointment of presidential electors. The Court in an unanimous opinion, after considering all of the sections of the Constitution involved, reviewing the debates in the constitutional convention, examining the

precedents set by the several states, respecting the mode of appointment of electors, upheld the Michigan statute. In its opinion the court said:

> "From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded **plenary** power to the state legislatures in the matter of the appointment of electors.
>
> "Even in the heated controversy of 1876-'77 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged: and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.
>
> **"In short, the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States."** (p. 877, 36L. Ed.). (Heavy print ours.)

This case, therefore, settled the law as to the full and complete authority of the state legislature to provide the mode of appointment.

In another case, Fitzgerald v. Green, 134 U. S. 377, the question was the right and power of the state to regulate and punish the acts of a citizen affecting the appointment of presidential electors. The defendant was convicted upon an indictment in the state court of Virginia charging him with having unlawfully voted for a Representative in Congress and for presidential and vice presidential electors, he being disqualified to vote by reason of a prior conviction for petit larceny. The defendant sought his release on a writ of habeas corpus, alleging that the offense for which he was convicted was a matter in the sole and exclusive jurisdiction of the Federal courts. This Court in a unanimous opinion upheld the full power of the state to regulate

acts affecting the appointment of presidential electors, declaring: 134 U. S. at p. 379.

> "The **only rights** and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the Senate in the presence of the two Houses of Congress, and the votes shall then be counted. Constitution, Art. 2, sec. 1; Amendments, art. 12.
>
> "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the Nation. **Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State Legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of representatives in Congress.** Constitution, art. 1, secs. 2, 3.

And at page 380:

> "Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States." (Heavy print ours.)

The indictment in that case charged the casting of an illegal vote both for a member of Congress and a presidential and vice presidential elector. The following reservation made by the court in its opinion is highly significant. It clearly recognized the distinction made

in the Constitution with respect to the power of Congress to legislate regarding the election of members of Congress, for which authority is expressly conferred by the Constitution, and its power with respect to acts influencing the appointment of presidential electors. The Court said: at page 380.

> "The question whether the State has concurrent power with the United States to punish fraudulent voting for representatives in Congress is not presented by the record before us. It may be that it has. Ex parte Siebold, 100 U. S. 371. But even if the State has no such power in regard to votes for representatives in Congress, it clearly has such power in regard to votes for presidential electors; **unaffected by anything in the Constitution and laws of the United States;** and the including, in one indictment and sentence, of illegal voting both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is, at the worst, mere error, which cannot be inquired into by writ of habes corpus. (heavy print ours.)

It is to be noted that the court made no reservation with respect to the power of Congress to regulate the incidents growing out of the selection or appointment of presidential electors.

These cases definitely settle two propositions:

1. The plenary power of the state to provide for the method of appointment of presidential electors with the single exception as to fixing the time and the limitation against discrimination on account of race, color, previous condition of servitude or sex contained in the amendments to the Constitution.

2. They also settle the full, complete and exclusive power of the state to regulate the acts of a citizen influencing the selection of a presidential elector by cast-

ing an illegal vote. This Court upheld the power of the state to punish for that offense and by virtue of the broad grounds upon which it based its decision excluded any right on the part of the Federal Government to punish for that offense.

In the instant case, the charge is the failure to report contributions made to influence the election of presidential electors. McPherson v. Blacker established that a popular election is an appointment. The reasoning of this Court in its decision in the Green case indicates clearly that the power to regulate acts and to punish for offenses affecting their appointment is the exclusive function of the state. This by reason of the nature of the subject must be so. Whatever may be the power of Congress to legislate with regard to presidential electors **after** they are appointed and become such, it is very clear that until the appointment is made there is under the Constitution no subject matter with regard to which Congress can legislate. A candidate for presidential elector is not an elector until after his appointment. (See **The Electoral System,** Dougherty, infra.) The Constitution nowhere deals with candidates for presidential electors.

8. THE DECISIONS OF THE STATE COURTS ESTABLISH THAT THE APPOINTMENT OF PRESIDENTIAL ELECTORS IS EXCLUSIVELY THE FUNCTION OF THE STATE LEGISLATURE AND THAT, AS TO HIS CREATION, HE IS A STATE OFFICER.

The plenary power of the states to regulate the appointment of electors and acts with respect thereto is uniformly upheld by the state courts. The most recent decision upon the question was the unanimous opinion of the members of the Supreme Judicial Court of Maine in 1919, Re Opinion of Justices (supra). The ques-

tion arose before the adoption of the XIXth Amendment to the Constitution of the United States providing for woman suffrage. The legislature of Maine, by an act of March 28, 1919, passed an Act granting to women the right to vote for presidential electors. A petition was filed praying that the Act be submitted to a vote of the people under the referendum provision of the state constitution. The question at issue, therefore, was whether, since the Constitution of the United States provided that the legislatures should determine the mode of appointment of presidential electors, an Act of the legislature dealing with the method of appointment could be referred to the people in a referendum. The Court, after citing the applicable provisions of the Federal Constitution, said (p. 1408, 5 A. L. R.):

> "These two subdivisions comprise all the provisions of the Federal Constitution applicable to the point in issue here. Under Sec. 1, subd. 4, Congress is given the power to determine the date of holding presidential elections and of the meeting of the electors, **but that marks the limit of its Constitutional power.** Re Green, 134 U. S. 377, 33 L. Ed. 951, 10 Sup. Ct. Rep. 586. **All other powers in connection with this subject are expressly reserved to the states.** McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869, 13 Sup. Ct. Rep. 3; Pope v. Williams, 193 U. S. 621, 48 L. Ed. 817, 24 Sup. Ct. Rep. 573.

Another recent case holding that presidential electors are state officers so far as their appointment is involved is in Re State Question No. 137, 244 Pac. 806, in which the Supreme Court of Oklahoma in an unanimous opinion construed the provisions of the state constitution in connection with the term "presidential electors" used in the Federal Constitution. The court declared:

> "Section 2 of article 5 of the (State) Constitution provides that:

> "'The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the state office receiving the highest number of votes at such election. * * *
> "'It is our opinion that the secretary of state properly designated the office of presidential elector as state officers, and used the vote cast therefor as the basis upon which to determine the number of signatures necessary'."

For a collection of cases see the note in 43 L.R.A. (N. S.) 282, et seq.

In Todd v. Johnson, 99 Ky. 548, 33 L.R.A. 399, 36 S. W. 987, presidential electors were held to be state officers within the meaning of the clause of the state constitution providing that vacancies in certain offices may be filled "in any election at which either city, town, county, district or state officers are to be elected." The case involved the question of when an election was to be held to fill a vacancy in the office of mayor of the City of Louisville occasioned by the death of that officer. The Constitution provided for a temporary appointment to fill such a vacancy, and the matter at issue was whether this was for the unexpired term of four years or was only until an election could be held as required by law.

In support of the proposition that a presidential elector is a state officer, the Court said:

> "He would seem, therefore, to be no more converted into a Federal officer because he is elected by the people to cast his vote for a presidential candidate than a member of the general assembly would be considered a Federal officer because, when elected, he casts his vote for a senator of the United States; for while the latter is supposed to do more than that, he does that much, and his status as a state officer is not affected."

There was a dissent by two justices in this case but

the majority opinion has become the settled law of the commonwealth, for it was cited and approved in the later cases of Donelan v. Bird, 118 Ky. 178, 80 S. W. 796; Hodge v. Bryan, 149 Ky. 110, 148 S. W. 21; Marshall v. Dillon, 149 Ky. 115, 148 S. W. 23. The dissenting minority were careful to point out in their decision the full power of the state to control all the incidents of appointment, for they said (33 L. R. A., 403):

> "IT MAY BE CONCEDED THAT WHEN THE STATE LEGISLATURE PROVIDES FOR THEIR APPOINTMENT BY A VOTE OF THE PEOPLE, UNDER THE POWER GIVEN BY THE FEDERAL CONSTITUTION, **THAT ELECTION IS HELD UNDER THE POWER AND SUBJECT TO THE CONTROL OF THE STATE AND FRAUDS IN ITS CONDUCT MAY BE PUNISHED BY THE STATE LAWS.**"

See also In re Absentee Voters Law (1921), 113 Atl. 293, 80 N. H. 595; Electoral College Case, 1, Hughes 571; 8 Fed. Cases 4336; State ex rel Barker and Bowen, 8 S. C. 382 (1876); Vertrees v. State board of Elections, 141 Tenn. 645, 214 S. W. 737 (1919); Fineran v. Bailey, 2 Fed. (2d) 363 (C. C. A. 5th Cir.) (1924).

9. STATE, NOT FEDERAL, COURTS EXERCISE JURISDICTION TO SETTLE DISPUTES REGARDING MANNER OF APPOINTING PRESIDENTIAL ELECTORS AND ACTS RELATING THERETO.

The plenary power of the state over the appointment of presidential electors is further emphasized by the fact that all questions dealing with their appointment are invariably settled by the state courts. The Federal courts have refused to entertain jurisdiction whenever

it has been sought to invoke their aid. The following are illustrative instances:

State v. Mountjoy, Mont. 271 Pac. 446 (1928).
State v. Stewart, 71 Mont. 358, 230 Pac. 366.
Vertrees v. State Board of Elections (1919), 214 S. W. 737; 141 Tenn. 645.
Breidenthal v. Edwards, 57 Kan. 332, 34 L. R. A. 146, 46 Pac. 469.
State v. Houser, 122 Wis. 534, 100 N. W. 964.
State v. Brodigan, 34 Nev. 486, 125 Pac. 699.
State v. Piper, 50 Neb. 25, 69 N. W. 378.
State v. Gifford, 22 Ida. 613, 126 Pac. 1060.
Sbarboro v. Jordan, 164 Cal. 51, 127 Pac. 170.
Spreckles v. Graham, 228 Pac. 1040; 194 Cal. 516.
In re Graves, 30 S. W. (2) 149 (Mo.).
Cunningham v. Cokeley, 79 W. Va. 60, 90 S. E. 546, L. R. A. 1917B, 718.

On the other hand, the Federal Courts have refused to entertain jurisdiction in matters relating to the appointment of presidential electors.

In Fineran v. Bailey, 2 Fed. (2d) 363 (1924), the Circuit Court of Appeals of the 5th Circuit affirmed the judgment of the District judge refusing relief to members of the Independent Progressive Party in the State of Louisiana who sought to have the names of individuals placed upon the ballot in that state to be voted upon for presidential electors, holding that it was an effort to make a writ of injunction serve the purpose of a writ of mandamus and a Federal Court has no power to issue a writ of mandamus except in aid of jurisdiction previously acquired.

In the Electoral College Cases (C. C. S. C. 1876), 1 Hughes (U. S.) 571, 8 Fed. Cas. No. 4336, in which the Federal Court, after a hearing upon a writ of habeas corpus, ordered the discharge of the members of the South Carolina Board of Election Canvassers who had

been committed for contempt of an order of the Supreme Court of the State requiring them to certify to it the election returns, the Federal Judge was careful to point out that the exercise of jurisdiction by the Federal Court was due to the fact that the returns upon election of members of Congress were involved.

The plenary power of the legislature to fix the manner of appointment of presidential electors is found in the development of the modern presidential preference primary. The legislature, in some states, has provided that the voters may express their preference by voting directly in a primary for the individual whom they prefer to be president, those to be candidates for presidential electors, also upon the names of individuals to be delegates to the national party convention at which the presidential candidate is to be nominated. These statutes vary.

In McCamant v. Olcott, 156 Pac. 1034, L. R. A. 1916E 706, 80 Oreg. 246, the Supreme Court of Oregon granted a writ of mandamus to require the Secretary of State to place upon the primary ballot the name of Hon. Charles E. Hughes as candidate for the Republican nomination for President, regardless of his wishes in the premises. The Court said:

> "THE OBJECT AIMED AT IS THE ASCERTAINMENT OF THE SENSE OF THE ELECTORATE of the particular party as to the proper person to be nominated by the national convention of such party, to the end that the delegates elected to represent their party in that body may be advised as to the wishes of their constituents. **The person thus designated as the voters' choice may or may not be a candidate in the sense of seeking or even desiring the nomination.** Primarily the object of the law is, not to serve the convenience of parties seeking a presidential nomination, but to enable the VOTERS TO EXPRESS THEIR PREFERENCE." * * *

> "The person whose name is thus placed upon the ballot is not a candidate in the sense of seeking or running for the office. The preferential vote cast in his favor does not nominate him for President, but is merely advisory to and morally obligatory upon the DELEGATES CHOSEN TO REPRESENT THE PARTY IN THE NATIONAL CONVENTION." (Capitals and black face ours.)

See also:

> Johnson v. Coyne, 47 S. D. 138, 196 N. W. 492 (1933).
> State v. Olson, 30 S. D. 57, 137 N. W. 561 (1912).

So plenary is the power of the legislature over the matter of appointment of electors that it can require the citizens of a state to vote for an entire block of electors representing a particular party and refuse to permit the citizen to vote his choice for individual electors. Thus, in State v. Pettijohn, 194 Pac. 328, the Supreme Court of Kansas said:

> "We regard it as clear that the words 'and no other space or margin shall be left in any such group of candidates' mean that no provision shall be made and no opportunity be given for placing a cross opposite the name of any individual elector included in the group. The manifest purpose of the provision is that one who wishes to vote for all the electors nominated by the party whose candidates for President and Vice President he favors may give effective expression to that wish by merely placing a cross in the square at the right of the names of the party's nominees for President and Vice President—just as under a former practice a vote for an entire party ticket was registered by placing a cross in a circle under the emblem at the head of the column."

The Court in its opinion pointed out that the same

practice obtained in Massachusetts. A similar ruling was made in New York in the case of Gerling v. Nichols, 206 N. Y. Supp. 191, where the objection was to the use of voting machines.

The development of these laws is but another evidence of the wide latitude allowed the state legislature in regulating the manner of appointing electors. The fact that new or varying methods of appointment have been employed does not in any way change the exclusive power of the state over the subject nor does it enlarge or grant to Congress any authority to legislate with respect to the subject, except to fix the time of choosing the electors.

10. THE IXth AND Xth AMENDMENTS RESERVE TO THE STATES RESPECTIVELY OR TO THE PEOPLE ALL RIGHTS NOT EXPRESSLY CONFERRED UPON THE CONGRESS BY THE CONSTITUTION.

> Constitution, Amendment IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> Constitution, Amendment X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The power to regulate and punish acts of citizens affecting a function committted to the states come clearly within the reservation of these amendments.

11. THERE IS NO POWER IN CONGRESS TO REGULATE ELECTIONS GENERALLY:

a. EVEN AS TO MEMBERS OF CONGRESS, IT IS LIMITED TO "THE TIMES, PLACES AND

MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES." THE FIXING OF THE QUALIFICATIONS OF THE VOTERS AS TO THEM IS RESERVED TO THE STATES.

Newberry v. United States, 256 U. S. 232, 249 involved a prosecution under the former Federal Corrupt Practices Act (held unconstitutional) against a candidate for the United States Senate and others for conspiracy to wilfully violate the act of Congress by contributing and expending money to procure the nomination to the United States Senate in a primary through the expenditure of an amount of money in excess of that allowed by law. Notwithstanding the express grant to Congress in Art. I Sec. 4, of the Constitution to regulate "the time, places and manner of holding elections for Senators * * * except as to the place of choosing Senators," the court held this conferred no implied authority to regulate a primary election, saying:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4."

The same principle was laid down in United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. Rep. 407, 6, L. Ed. 857. Thus even where there was an express grant of authority to regulate the election of Senators, this court declined to imply a power in Congress to punish acts influencing their nomination.

b. THE RIGHT OF SUFFRAGE IS CONTROLLED BY THE STATES, EXCLUSIVELY, EXCEPT AS AGAINST DISCRIMINATION.

It is settled that the Constitution does not define the privileges and immunities of citizens and the right of suffrage is not one of them. In Minor v. Happersett, 21 Wall, 162, 22 L. Ed. 627, 629, the court said of the XIVth Amendment:

> "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizens."

In McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869, at p. 878, it is said:

> "The right to vote in the States, comes from the States, but the right of exemption from the prohibited discrimination, comes from the United States."

It is also settled that the prohibitions of the XIVth Amendment have reference to state action exclusively. Virginia v. Rives, 100 U. S. 313, 10 Otto 313, 25 L. Ed. 667; Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. Rep. 6, 51 L. Ed. 65.

Civil rights such as are guaranteed by the Constitution against state aggression cannot be impaired by the wrongful act of individuals unsupported by state authority in the shape of laws, customs, judicial or executive proceedings. Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18, 27 L. Ed. 835.

The XVth Amendment brought the right of citizens of the United States to vote within the protection of

Congress. The right of suffrage was not made coextensive with citizenship and this amendment did not confer the right of vote upon any one. It left the power to determine the qualifications of voters to the several states.

United States v. Reese, 92 U. S. 214; 23 L. Ed. 563.
Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 30 L. Ed. 766.
United States v. Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601, 27 L. Ed. 290.
Minor v. Happersett, 21 Wall. 162; 22 L. Ed. 627.
United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

A statute which attempts to punish purely individual action as distinguished from some act of the state or state agencies, cannot be sustained under the XVth Amendment. James v. Bowman, 190 U. S. 127, 23 Sup. Ct. Rep. 678, 47 L. Ed. 979.

The decisions under the XIVth and XVth Amendments settle conclusively that these amendments did not have the effect of conferring any general authority upon Congress to regulate elections. Its legislative authority is restricted simply to prevent the discriminations covered by these amendments and can be exerted only against acts of the state or state agencies.

12. IN THE ABSENCE OF CONSTITUTIONAL PROVISION THERE IS NO AUTHORITY IN CONGRESS TO REGULATE THE COLLATERAL ACTS OF CITIZENS INFLUENCING ELECTIONS.

It is elementary that Congress has no power to police the acts of citizens except with respect to a function committed by the Constitution to the Federal Government. United States v. DeWitt, 9 Wall. 41, 19

L. Ed. 593. Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835; United States v. Curikshank 92 U. S. 542, 23 L. Ed. 588; United States v. Reese 92 U. S. 214; 23 L. Ed. 563.

The function of appointing presidential electors and to police the acts of citizens affecting the discharge of this duty is by the Constitution expressly reserved to the state.

Hon. James M. Beck, in "The Vanishing Rights of the States" (1926), a discussion of the power of the Senate to refuse to seat a Senator (Vare) because of large campaign expenditures, said, p. 82:

> "There is a clear distinction between the machinery of 'elections' from the registration of the voter and the final casting of the ballot, over which Congress has undoubtedly this supervisory power, and the collateral and ancillary activities of citizens in selecting their candidates and in conducting their political campaigns.
>
> "To argue that the Federal government has dangerous extention of Federal power, of which no man could see the end. For example, Congress could require primaries as against the wish of a state, or could require conventions; or it could restrict candidates or define issues. Where would be the limit of such power?"

Or, as the matter was expressed by the Hon. Charles E. Hughes, as counsel, in his brief in the Newberry case, supra:

> A distinction is at once apparent between the regulations of the manner of holding elections, in order to protect the right of the voter in casting his vote and to secure a fair count of the vote, and the attempt to interfere with or control the activities of the people of the States in the conduct of political campaigns. In other words, if we assume the validity of regulations which pro-

tect each qualified voter in the exercise of his right to vote and which provide for the supervision of the casting of the vote and the proper ascertainment of the result of the vote, then the question is whether Congress can go further and attempt to control the educational campaign. Upon what ground can it be said that Congress can provide how many meetings shall be held, where meetings shall be held, how many speakers shall be allowed to speak for a candidate, how many circulars may be distributed, how many committees may act in behalf of a candidate, how they shall be organized and what shall be the limit of their honest activity?

"To hold that Congress may regulate such modes of popular expression, or may thus impose its will upon the extent of the political activity of the people of the States, is to ignore the fundamental limitations of the power of Congress. No one can read Hamilton's articles in the 'Federalist' with respect to this power and believe for a moment that there would have been any chance of ratifying the Constitution had it been proposed to delegate such a power."

The extent to which Congress may regulate the activities of citizens in influencing the election to Congress of candidates of their choice, where such acts do not relate to, order at the polls, the actual casting of the ballot, the preservation of it, the count, and the certification of the returns is undermined, for these questions have never been passed upon by this court. All of the cases arising under legislation enacted by Congress to control Congressional elections have related to elections, directly and have been connected with the holding of the election itself or matters arising thereafter. Diligent research has failed to disclose any case passing upon the power of Congress to regulate the inherent right of the citizen to exercise free speech, freedom of the press, liberty of action in going

from one place to another, advocating the merits of the candidate whose cause he espouses, a policy of government which he may favor, or opposing a candidate or a particular policy of government. So far as appears from judicial decisions, the legislative power of Congress with respect to such acts by citizens remains undefined, even as to elections of members of Congress. This was pointed out by the Hon. Charles E. Hughes in his brief in the Newberry case, quoted supra.

The instant case does not involve the question of the power of Congress to regulate expenditures to influence the election of members of Congress and the subject is referred to merely to show the extent to which the law may be regarded as judicially settled upon the extent of legislative authority possessed by Congress to regulate the election of Representatives and Senators where there is an express grant of power to Congress to regulate the "manner" of holding Congressional elections. There is no power in Congress to regulate the activities of citizens in the exercise of their political rights affecting the discharge of a function committed to the state by the Constitution.

The majority opinion insists that the Corrupt Practices Act of 1925 is a mere publicity requirement and is not a regulation of the appointment of electors or of acts affecting their appointment. The attempted distinction between a publicity requirement and the term regulation is a difference of words only. They are fundamentally the same. What does the act attempt to do? It requires that before any body of persons can associate to influence the election of Presidential electors in two or more states, or even in a single state, if they be a branch or subsidiary of a nationl organization, that they shall appoint a political committee. That political committee is required to have a chairman and a treasurer. The treasurer is required

to keep accurate and detailed accounts with the name and address of every person making a contribution "to" or "for the committee" of as much as $100 in a calendar year and the name and address as well as a receipted voucher for all expenditures made "by the committee" or "on behalf" of the committee exceeding $10.00 in amount. These are certainly regulations. They have nothing to do with publicity. The only publicity requirement is the filing of reports as treasurer at stated intervals with the Clerk of the House of Representatives. The Act (Section 251 Title 2 U. S. C.) further prohibits any corporation from making a contribution to influence the election of presidential and vice-presidential electors regardless of whether it shall be a corporation created by the State or Federal government. There is certainly a regulation. Also why the distinction between the exercise of power by Congress in one state, in two states, or in all of the states? If local committees in the several states may corrupt the presidential election, does it not just as much affect all subsequent acts required of Congress after the elector is appointed, such for example, as counting the electoral vote for President or deciding the vote in the House of Representatives in the event no candidate has a majority in the electoral college? Is the office of Chief Magistrate any less affected? These suggestions show the fallacy in the reasoning.

If Congress is possessed of an implied power to enact publicity regulations and to require committees to be constituted in a certain way, to keep their accounts as specified and to report on designated dates, where does that power end? May it limit the amounts that may be expended and prescribe the mode of conducting political activities by the citizens?

Even in the instance where the Constitution imposes a specific duty upon Congress to count the electoral vote in a Presidential election, it has been held that

this specific grant of authority carried with it no implied power to go behind the certification of the electoral votes of a state although fraud was charged. (Elec. Coll. Cases.) There is therefore absolutely no reason to sustain an implied authority in Congress with respect to matters affecting the appointment of Presidential electors which the Constitution has by definite language not only committed to the State Legislatures but in the same clause has granted to Congress in terms the only authority it was intended that it should exercise, namely, to fix the time of choosing.

13. TEXT WRITERS ON CONSTITUTIONAL LAW AGREE THAT THE STATE LEGISLATURE IS POSSESSED OF PLENARY POWER WITH RESPECT TO THE APPOINTMENT OF PRESIDENTIAL ELECTORS AND TO REGULATE ALL ACTS RELATING THERETO.

One of the most complete discussions of the electoral system is the work of Dougherty entitled, "The Electoral System of the United States." With respect to the nature of the power vested in the state legislatures respecting the appointment of presidential electors, at p. 20, he says:

> "This terse clause, the outcome of long debate in the convention, is so worded as to vest the manner of appointment of the electors to which each state is entitled, in the legislature of the state. There is no obligation on the part of the state to appoint electors. **It may, if it so wills, decline to participate in a presidential election and such failure actually happened in New York in 1789.** The state assembly, full of the partisans of Clinton, and strongly anti-federal, wished to vote for electors in joint convention with the Senate, which would have given the anti-federalists two United States Senators and ten electors. But

the upper House insisted upon a concurrent vote, which would have given it one Senator and five electors. As neither house would recede from its position, the state lost its electoral vote. Neither North Carolina nor Rhode Island had ratified the Federal Constitution when the first election occurred, and as a consequence neither of these states took part in it.

"**The legislature of each state is clothed with absolute power to determine in what manner the electors shall be appointed.** The word 'Appoint' is highly significant. It was designedly employed. It is not a democratic term; there is no implication of a popular election in it. The convention could not have employed a stronger expression to import the plenary authority of the state. So absolute is the power conferred upon each state legislature that it may, as was said by the eloquent Henry R. Storrs, of New York, in the House of Representatives in the spring of 1826, vest the appointment of electors in 'a board of bank directors, a turnpike corporation, or a synagogue.' The number of electors to which each state is entitled is equal to the whole number of Senators and Representatives to which the state is entitled in Congress. This clause is one of the compromises of the Constitution between the large and the small states. It recognizes the rights of a state as a separate entity, but also the right of majority rule. The electoral colleges, says Bancroft, were to be the 'exact counterpart of the joint convention of the two Houses in the representation of the states as units, as well as the population of the states.' A state, no matter how small in population, is entitled to two Senators and at least one Representative. This inequality of representation gave rise to the statement that 'the small states were the favorites of the Constitution,' but this apparent advantage is nullified under the general ticket system, which makes the election turn upon the vote in the large states.

(P. 395.) "As the Federal Constitution, in prescribing that each state may appoint electors in

such manner as the legislature of the state may direct, so conciliated the law-making body of the state about the state and its people that the legislature may defy the intentions of the state constitution and appoint electors in any manner it may please. **The legislature of any state in the Union may at any time, says Morton, take away from the people of that state the privilege of voting for presidential electors,** and no provision of the state constitution can successfully prevent it from doing so. Morton's colleagues upon the Senate Committee that reported the proposed constitutional amendment of 1874 evidently agreed with him, for the view of the committee was that:

"'The appointment of electors * * * is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their Senators of the United States, and that under the Constitution as it now stands it is in the power of any legislature to repeal the laws providing for the election of electors by the people, and take such election into its own hands. It may be said that this is not likely to be done; but the answer is, that it may be, and that it has been done; and who can tell what may be the future exigencies of parties and politicians, or what they may not do?'" (Heavy print ours.)

The writers of treatises on the Constitution use various terms describing the power of the state legislature to fix the mode of the appointment of presidential electors, which is variously characterized as "absolute," "plenary," "exclusive," and other expressions indicating that **all** power over the method of appointment and **all acts relating thereto is vested exclusively in the state legislature.** Thus in Willoughby on the Constitution, Vol. 3, 2d Ed., p. 1452, he says, "It will be observed that the Constitution gives **complete power** to the states in the election of presidential electors." In Sec. 939, regarding vacancies, he says,

"The states having plenary power over the appointment of electors may make provision for the contingencies of an elector dying between date of his appointment and the time of the casting of this vote or by sickness or accident being prevented from voting." In Burgess on "Political Science and Constitutional Law," Vol. 2, Chap. 3, page 216, it is said, **"To the point of the completion of the election of the electors the legislature of the state has plenary and exclusive power conferred upon it by this provision of the Constitution. * * * It appears to me manifest, therefore, that the original intention of the Constitution was to invest the legislature of the commonwealth with plenaty power over the appointment of presidential electors, except as to the time of their appointment and to exclude not only any interference of the general government in this sphere but also any interference not permitted by the legislature on the part of any organ of the commonwealth."** (Heavy print ours.)

The only specific study of the question of the constitutionality of the Federal Corrupt Practices Act as it applies to presidential electors is that of Professor Earl R. Sikes, in his work entitled, "State and Federal Corrupt Practices Legislation" (1928). He concluded the statute is unconstitutional, saying (p. 228):

> "The opinion must be reached that Congress has no constitutional power to regulate the use of funds in presidential elections."

It is interesting to note that Professor Sikes was one of the experts called before the select committee of the Senate of the 71st Congress to assist it in the preparation of new corrupt practices legislation. The Senate Committee in its report recommended the repeal of the present law, and the enactment of different legislation.

See also "Constitution of the United States," by Tucker, Sec. 162, p. 321; Story on the Constitution; Kent's Commentaries; Watson on the Constitution; 39 Cyc. United States p. 702.

It would be possible to encumber this brief with an indefinite number of quotations from authorities all supporting the proposition that the matter of the appointment of presidential electors and all acts influencing their appointment are within the exclusive control of the state. This principle is so well established and so elementary that it is thus stated in Encyclopedia Americana, Vol. 10, p. 88: "The electoral colleges are state bodies and their integrity as such is scrupulously guarded. * * * The method of appointment is left absolutely to the state legislature."

14. THERE IS NO INHERENT OR IMPLIED POWER IN CONGRESS TO REGULATE THE APPOINTMENT OF PRESIDENTIAL ELECTORS:

Art. I, Sec. 8 of the Constitution dealing with the legislative authority of Congress provides the Congress shall have power:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This provision is the one relied upon by the majority of the Court of Appeals as authority in support of implied power upon the part of Congress to enact legislation. It is well settled, however, that this provision of the Constitution will support Congressional legislation only when some power with respect to the

subject matter is conferred upon Congress by the Constitution. In such case this provision authorizes Congress to determine the details of legislation necessary to effectuate the constitutional purpose. **It will not support legislation** when no power with respect to the subject is conferred by the Constitution.

This principle was succinctly stated in Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956, 970, wherein it was said of this section:

> * * * **"is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned."** (Heavy type ours.)

The state is vested with the power to appoint presidential electors. The election at which they may be voted upon, if the legislature elects that method, is held by state officers and at state expense. The citizens who exercise their suffrage do so pursuant to state law, subject to Federal protection only as against discriminations covered by the XIIIth, XIVth, XVth and XIXth Amendments. The state may enact police regulations pursuant to its police power to regulate the acts of citizens seeking to influence the preformance of a state function reserved to the state by the Federal Constitution. It is respectfully submitted that there is neither occasion nor justification for the invoking of the doctrine of implied power over a subject so thoroughly reserved to the states by the Constitution of the United States.

PART III.

INDICTMENT STATES NO OFFENSE

Not only is the statute unconstitutional, but the in-

dictment is insufficient to comply with the VIth Amendment. The indictment charges merely that one E. C. Jameson made specified contributions "for the committee." It does not allege who constituted the committee, to whom the contributions were paid, or that they were ever accepted by the committee.

Petitioners contend that contributions made "for the committee" are those referred to in Sec. 243 which provides how a contribution "for the committee" shall be accounted for to the treasurer. It reads:

> "Accounts of contributions received. Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

The petitioners' contentions respecting the proper construction of the statute are more fully set forth in the petition for writ of certiorari, pp. 10-18.

Congress, in enacting legislation dealing with Congressional campaigns and with Presidential elections, having a nation-wide scope, recognized throughout the distinction between direct and indirect political activities, i. e., the acts of the committee itself and acts of other persons "for" or "on behalf" of the committee. No committee can conduct all activities of a political campaign or even know of them. The act, therefore, distinguished between acts done by the committee itself and by others, for or in its behalf, and clearly delineated the different circumstances under which responsibility of the treasurer should arise. This distinction is made with respect to reports required of political committees, also with respect to reports required of candidates for the Senate, House of

Representatives, Delegates or Resident Commissioner to Congress, and applies alike to expenditures as well as to contributions. The difference made in the act between direct and indirect activities can be graphically shown by tabulating and classifying the statute with respect to the several phases of activity with respect to which it requires reports. They are:

(a) POLITICAL COMMITTEES—

REPORTS REQUIRED

Contributions are

1. Direct, i. e., those made to the committee. See Sec. 244 (a, 1) 242 (b, 1).
2. Indirect, i. e., those made for the committee. Sec. 243; 244 (a, 1) 243; 242 (b, 1).

Expenditures

1. Direct i. e., those made by the committee. Sec. 244 (a, 4, 5, 6) 242 (b, 3).
2. Indirect, i. e., those made on behalf of the committee 244 (a, 4, 5, 6), 242 (b, 3).

(b) CANDIDATES—REPORTS REQUIRED

Contributions

1. Direct, i. e., received by the candidate. Sec. 246 (1).
2. Indirect, i. e., received by any person on behalf of the candidate with his knowledge and consent. Sec. 246 (1).

Expenditures

1. Direct, i. e., made by the candidate. Sec. 246 (a, 2).
2. Indirect, i. e., made by any person on his behalf with his knowledge or consent. Sec. 246 (a, 2).

Pledges

1. Direct, i. e., by the candidate. Sec. 246 (a, 3).
2. Indirect, i. e., by any person for him with his knowledge or consent. Sec. 246 (a, 3).

(c) ACTIVITIES OF INDIVIDUALS—

REPORTS REQUIRED

Expenditures by individuals to influence election of candidates for Congress in two or more states when not made to a committee. Sec. 245.

Sec. 243 of the act plainly indicates that something more than mere knowledge of an indirect contribution is required of the treasurer of a political committee before there can arise the obligation upon the part of the treasurer to report it. For, in a supposititious case in which an unauthorized person receives a contribution for a political committee which is appropriated to his own use and never accounted for to the treasurer of a political committee, the treasurer might have knowledge that such a contribution was made for the committee but certainly would be under no duty to report it since the money never reached the treasurer's hands and was not used for political purposes at all. This would be true even though the contributor made the contribution in good faith thinking he was making it for the political committee and intended it to be used for political purposes. It is unreasonable to suppose that Congress intended to impose any liability upon persons serving as treasurers of political committees which it could not constitutionally exact.

That Congress did not intend any such hazard to be imposed upon persons exercising their political rights in influencing elections is further shown by reason of the fact that in Sec. 246 which relates to statements of campaign contributions to be filed by candidates for Senator or Representative it is provided that the statement shall contain "a correct and itemized account of each contribution received by him or **by any person for him with his knowledge or consent** from any source in aid or support of his candidacy for election." The members of Congress who voted for this measure clearly recognized that a candidate for Congress should not be indicted and subjected to prosecution merely because some person without his knowledge or consent somewhere in his district made a contribution to some other person to influence his election. Likewise, in

dealing with political committees generally, it did not impose any such unconscionable or unconstitutional responsibility, for in Sec. 244, dealing with the reports of indirect contributions made for the committee which the treasurer is required to report, although the draftsman did not use the words "made with his knowledge or consent," in Sec. 244, yet it is clear that contributions **"for the committee,"** referred to are those accounted for to the treasurer as required by Sec. 243 immediately preceding. Therefore, having defined in Sec. 243 that indirect contributions were those to be accounted for to the treasurer as therein provided, it was unnecessary in Sec. 244 to use the words, "with the knowledge or consent of the treasurer."

The gravemen of the offense in this case is the alleged failure of the treasurer of a political committee to report an indirect contribution made for the committee. It is submitted that in none of the counts of this indictment has the government alleged facts setting forth circumstances giving rise to the duty under the statute upon the part of the treasurer to make a report. The mere allegation that a contribution was made by one E. C. Jameson **for said committee** does not show to whom the contribution was paid, that it was ever accepted, accounted for to the committee, or other circumstances giving rise to the duty upon the part of the treasurer to make an accounting. These are essential elements of the offense under the statute where the government elects to prosecute for an indirect contribution, i. e., "for the committee" and their omission makes the indictment fatally defective. Merely following the statute is not always sufficient:

United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

Moens v. United States, 50 App. D. C. 15, 267 Fed. 317.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.
United States v. Johnson, 26 App. D. C. 136.
Miller v. United States, 136 Fed. 581.
People v. Wys, 25 Porto Rico, 483.
Duncan v. State, 7 Humphr. 148 (Su. Ct. Tenn.).

It is clearly apparent that the use of the word "wilfully" where it appears in the felony counts was intended by the draftsman of the indictment to indicate merely that the increased penalty provided under Sec. 252 was to be invoked. Furthermore, this Court has held that in an indictment under the National Banking Act charging that the accused "wilfully misapplied funds" is insufficient to inform him of the nature of the cause and accusation against him. In United States v. Britten, 107 U. S. 655, 27 L. Ed. 520, 525, is was said:

> "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the words, 'embezzle,' as used in the statutes, or the words, 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one."

See also:

Felton v. United States, 96 U. S. 699; 24 L. Ed. 875.
Spurr v. United States, 174 U. S. 728, 43 L. Ed. 1150.

From a reading of the Federal Corrupt Practices Act of 1925, it is apparent that the words "wilfully violates" used in Sec. 252 (b) relating to penalties involves not only a conscious failure to report but also a purpose to do wrong, and the mere allegation of a wilful failure to report indirect contributions does not set forth sufficient allegations of fact with respect thereto to charge the offense against the treasurer. Thus, in Potter v. United States, 155 U. S. 438, 39 L. Ed. 214, where the charge was that the banker "did unlawfully, knowingly and wilfully certify a check" when there were no funds to meet it, the Supreme Court held that in order to convict under the statute a purpose to do wrong must be shown. The indictment in that case, unlike the one in the instant case, was based upon a statute the language of which was sufficient to acquaint the accused with the offense charged and related to the act of the defendant, himself, in certifying the check; whereas the offense in the instant case relates to a contribution alleged to have been made by a third person for the committee and not charged to have been accounted for to the treasurer or to any agent of the committee and without the allegation of other facts setting up a duty upon the part of the treasurer to demand an accounting.

It is essential that scienter be directly, and not inferentially alleged.

United States v. Carll, 105 U. S. 611.
Moens v. United States, 50 App. D. C. 15.
Pettibone v. United States, 148 U. S. 197, 206, 208.

If a statute upon which the indictment is founded only describes the general nature of the offense prohibited, the indictment, in repeating its language without averments disclosing the particulars of the alleged

offense, states no matters upon which issue can be formed for submission to a jury.

United States v. Hess, 124 U. S. 483, 486.
Keck v. United States, 172 U. S. 434, 437.
Moens v. United States, 50 App. D. C. 15.
Foster v. United States (C. C. A., Wash.) (1918) 253 Fed. 481.
Collins v. United States, (C. C. A.) (1918) 253 Fed. 609.
United States v. Marx, (D. C. Va.) (1903) 122 Fed. 964.
United States v. B. & O. R. R. Co., (D. C. W. Va.) (1907) 153 Fed. 997.
United States v. Bopp. (D. C. Cal.) (1916) 230 Fed. 723.
United States v. Robinson, (D. C. Okla.) (1920) 266 Fed. 240.

If the offense cannot be accurately and clearly described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent.

United States v. Mann, 95 U. S. 580, 585.
Moens v. United States, 50 App. Cas D. C. 15.

II.

Not only does the indictment in the instant case fail to charge knowledge, or any facts from which knowledge may be implied, but it is fatally defective in failing to allege facts giving rise to the duty of the treasurer to make a report, which is a necessary element of the offense where the prosecution is for an indirect contribution. In the instant case it is charged merely that contributions of money were made by Jameson, "for the committee." It is not alleged that the committee or the treasurer ever received or ac-

cepted or ratified or approved the same. This is clearly insufficient to state an offense under the act.

The intention of Congress in the Federal Corrupt Practices Act is clearly evidenced by other sections of the act. Sec. 241 declares that no contributions shall be accepted until a political committee is appointed, which shall have a chairman and a treasurer. Secs. 242, 243, and 244 draw clearly the line of demarcation between direct and indirect contributions. Sec. 243 defines indirect contributions as those made for the committee, and the act requires an accounting to the treasurer for such contributions. A similar distinction is also made with respect to expenditures. The act must be construed as a whole, and the intention of Congress determined not simply from the isolated clauses of a single section.

The unquestioned purpose of the act was to create responsible committees and to require that all of the funds received or expended by that committee should be handled by the treasurer. The treasurer is required to keep books showing the names and addresses of the persons making the contributions and similar records regarding expenditures. No treasurer can keep the records required under this act unless an accounting is made to him of contributions made for the committee and it was because of this that Sec. 243 provided how such an accounting should be made to the treasurer. Sec. 244, which immediately follows and which makes it the duty of the treasurer to report, so far as indirect contributions are concerned, required a report only of contributions made for the committee in the manner indicated by Sec. 243.

It is submitted that any lawful indictment of the treasurer under this statute must charge either that the contribution came into her hands or was accounted for to her.

Any other construction would make the treasurer

of a political committee responsible, without limit, for every contribution which the giver intended for the committee regardless of the actual disposition thereof, and put upon such treasurer the impossible burden of pursuing every rumor of irresponsible gossip respecting contributions alleged to have been made but never accounted for, at the peril of indictment for omission thereof from his report which he must swear to be true, and with respect to the items so reported although never coming into his hands, making him likewise liable to indictment if he is unable to procure a receipt or voucher showing the expenditure thereof by the recipient.

The only reasonable and workable construction of this law is to consider the treasurer's obligation to report as co-extensive with his duty to keep an account, and limited to such contributions as are actually received by him or accounted for to him under Sec. 243.

This indictment, therefore, fails to charge a crime in that there is no charge that the Jameson contributions ever came to the treasurer or were accounted for to her.

If the indictment fails as to Miss Burroughs, the treasurer, it necessarily fails with respect to Cannon, who is charged merely with being an accessory.

Upon the same reasoning, the counts for conspiracy must fail, since the alleged conspiracy was directed solely to the failure to file reports as alleged in the preceding counts.

The members of Congress are actively engaged in politics. They have been elected to public office. They know something of the methods and hazards of political campaigns. They were cognizant of the fact that in a campaign on a nation-wide scale it was entirely possible that individuals might make contributions for political committees which might not come directly to

the notice of the treasurer. In connection with their own candidacies they made clear that they were not to be accountable for contributions made by persons on their behalf except those made with the candidate's knowledge and consent. (Sec. 246, a-2) By providing the duty of a recipient of an indirect contribution for any other political committee to account to the treasurer for such contribution there is clearly evidenced an intent not to hold such treasurer to any higher degree of accountability. Congress made very clear in the structure and language of the act the distinction between legal accountability of a treasurer with respect to the two types of contribution. This is a penal statute and it should be strictly construed.

In view of the entire act and its purpose it is respectfully submitted that it was not the intention of Congress to allow contributors of funds for the committee to determine the liability of the treasurer, but rather the obligation of the treasurer is dependent upon whether the funds are accounted for to him, or other facts showing a duty upon the part of the treasurer to demand an accounting. If the government in this case was unable to allege that these funds were accounted for to the treasurer or that the treasurer had knowledge of them, **it has its remedy against the recipient under Sec. 243, who failed to account to the treasurer for them, if the facts were sufficient to justify such an indictment.**

THIS COURT'S CONSTRUCTION OF FORMER CORRUPT PRACTICES ACT REFUTES MAJORITY THEORY.

The unsoundness of the majority's construction and the distinction between direct and indirect political activities is well shown by the decision in Newberry v. United States (supra.) In that case the court was unanimous in the judgment reversing the trial court; five members of the court placing their decision on the

ground that the former Corrupt Practices Act was unconstitutional in so far as it attempted to regulate expenditures in Congressional primaries, but four of the members of the court based their opinions upon the construction of the statute upon which the indictment was based.

The indictment charged that Newberry and 134 others unlawfully and feloniously did conspire, combine, confederate and agree together to commit an offense against the United States, to-wit: the offense on the part of Truman H. Newberry of wilfully violating the Federal Corrupt Practices Act of 1910 as amended by giving, contributing, expending, using and by causing to be given, contributed, expended and used to procure his nomination for election as Senator, a sum in excess of $3,750 allowed by law.

The demurrer filed challenged the constitutionality of the act insofar as it attempted to regulate primary elections but did not raise the question of the sufficiency of the indictment as a pleading, but the Court was called upon to construe that act as it related to the responsibility of a candidate for contributions or expenditures made by him—or caused to be made by him and contributions and expenditures made independently by others in behalf of his candidacy. This is clearly set forth in the language of Chief Justice White when he says, 256 U. S. 232, 274:

> "The error in the instruction plainly resulted from a failure to distinguish between the subject with which the statute dealt—**contributions and expenditures made or caused to be made by the candidate—and campaign contributions and expenditures not so made or caused to be made, and therefore not within the statute.** * * *
>
> "To treat the candidacy, as did the charge of the court, as being necessarily the cause, without more, of the contribution of the citizen to the cam-

paign, was therefore to confound things which were wholly different, to the frustration of the very object and purpose of the statute. To illustrate: Under the instruction given, in every case where, to the knowledge of the candidate, a sum in excess of the amount limited by the statute was contributed by citizens to the campaign, the candidate, if he failed to withdraw, would be subject to criminal prosecution and punishment. So, also, contributions by citizens to the expenses of the campaign, if only knowledge could be brought home to them that the aggregate of such contributions would exceed the limit of the statute, would bring them, as illustrated by this case, within the conspiracy statute, and accordingly subject to prosecution. Under this view the greater the public service, and the higher the character of the candidate, giving rise to a correspondingly complete and self-sacrificing support by the electorate to his candidacy, the more inevitably would criminality and infamous punishment result both to the candidate and to the citizen who contributed.

"As it follows from the considerations which I have stated that the judgment below was, in my opinion, clearly wrong, and therefore should be reversed." (Heavy print ours.)

Mr. Justice Pitney expressed the matter thus:

"A reading of the entire act makes it plain that Congress did not intend to limit spontaneous contributions of money by others than a candidate, nor expenditures of such money except as he should participate therein. Of course, it does not mean that he must be alone in expending or causing to be expended the excessive sums of money; if he does it through an agent or agents; or through associates who stand in the position of agents, no doubt he is guilty; 'qui facit per alium facit per se;' but unless he is an offender as a principal, there is no offense. Section 332, Criminal Code (35 Sta. at L. 1152, chap. 321, Comp. Stat. Chap. 10,506, 7 Fed. Stat. Anno. 2d ed. p.

984), declares: 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.' Clearly this makes anyone who abets a candidate in expending or causing to be expended excessive sums a principal offender; **but it cannot change the definition of the offense itself as contained in the Corrupt Practices Act,** so as to make a candidate a principal offender unless he directly commits the offense denounced. **Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.** * * *

"His mere participation in the activities of the campaign, even with knowledge that moneys spontaneously contributed and expended by others, without his agency, procurement, or assistance, were to be or were being expended, would not of itself amount to his causing such excessive expenditure. The effect of the instruction that was given may well have been to convey to the jury the view that * * * Mr. Newberry's participation in a campaign where money in excess of the prescribed limit was to be expended, even without his participation in the contribution or expenditure of such money, amounted to a conspiracy on their part to commit an offense against the act." (Heavy print ours.)

In construing the former Corrupt Practices Act this Court clearly recognized the distinction made between direct and indirect political activities. It held that a candidate would not be liable to conspiracy for the expenditure of an amount in excess of that fixed by law, **even though he knew of it,** unless it was **shown that either he personally or through his agents caused the contributions or expenditures.** Mere knowledge was insufficient, so in the instant case the present Corrupt Practices Act recognizes throughout the dis-

tinction between direct and indirect political activities and it clearly never was the intention of Congress to hold the treasurer of a political committee liable for conspiracy to fail to report contributions on the bare allegations that someone made contributions "for the committee" without any charge showing to whom the contribution was made, or the allegation of any other facts charging the treasurer with knowledge, or giving rise to the duty to demand an accounting.

CONCLUSION

It is respectfully submitted that the majority of the Court of Appeals of the District of Columbia erred in holding the section of the Federal Corrupt Practices Act upon which indictment was based to be constitutional, also that the indictment is sufficient to state an offense under the statute.

Conscientiously believing that the constitutional rights of the petitioners have been jeopardized by the majority decision of the Court of Appeals of the District of Columbia and that the grave question of constitutional law as well as of statutory construction involved in this case of first impression under the Federal Corrupt Practices Act of 1925 should be finally settled in the public interest, it is respectfully submitted that the writ of certiorari should issue.

Respectfully submitted,

ROBERT H. McNEILL,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 434

ADA L. BURROUGHS AND JAMES CANNON, JR.,
Petitioners.

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONERS

The government's theory is that the office of President is a constitutional one essential to the Federal government; that although the method of the appointment of presidential electors is committed to the state Legislatures, nevertheless there are certain functions with respect to the election of a President over which Congress has jurisdiction, such as the counting of the electoral vote, also the necessity for the House of Representatives to elect the President in the event of a

failure of one candidate to obtain a majority in the Electoral College; and that in order to obtain information for the proper discharge of these functions, Congress, under the elastic clause, Art. I, Sec. 8, Clause 18 of the Constitution of the United States, may enact legislation providing publicity for the activities of citizens influencing the election of presidential electors by which it may judge of the fitness of a presidential candidate, providing such legislation does not conflict with the power of the states to appoint electors.

It is respectfully submitted that such a construction of the Constitution of the United States cannot be justified for the following reasons:

The Constitution, Art. II, Sec. 1, expressly commits to the state the power of the appointment of presidential electors and at the same time defines the scope of authority Congress is to exercise over that subject, viz., to "determine the time of chusing the electors and the date on which they shall give their votes, which day shall be the same throughout the United States."

The sections of the statute and the acts charged in the indictment relate solely to acts affecting the appointment of electors, a matter committed to the states exclusively.

The election at which electors are appointed, if the Legislature selects that method, is held and controlled exclusively by the states. The qualifications for suffrage, except as protected against discriminations covered by the Fourteenth, Fifteenth and Nineteenth Amendments to the Constitution of the United States, are fixed by the state law.

Congress has no power to regulate elections except where authority is expressly conferred by the Constitution, e. g., in the case of members of Congress.

Even here it is limited and is not to be extended by implication.

United States v. Gradwell 243 U. S. 476, 61 L. Ed. 875, 37 Su. Ct. Rep. 407.

Newberry v. United States, 256 U. S. 232, 41 Su. Ct. Rep. 469, 65 L. Ed. 913, 918: it was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4."

The elastic clause will not support an implied power with respect to a subject which the Constitution has expressly committed to the states.

Kansas v. Colorado, 206 U. S. 46, 88; 51 L. Ed. 956, 970

This Court has held with respect to a presidential elector:

> "They are no more officers or agents of the United States than are the members of the state Legislatures when acting as electors of Federal Senators, or the people of the states when acting as electors or representatives in Congress." (Fitzgerald v. Green 134 U. S. 377, 33 L. Ed. 951, 952.)

This Court has upheld the right of a state to punish the acts of citizens in unlawfully influencing the election of presidential electors.

Fitzgerald v. Green, 134 U. S. 377, 33 L. Ed. 951, 10 Su. Ct. Rep. 586.

The tenuous nature of the reasoning advanced by the government attempting to justify the provisions of the Federal Corrupt Practices Act relating to pres-

idential electors as a publicity act seeking merely to provide information by which the fitness of a candidate for President may be determined, (a) when the House of Representatives is required to elect from among the three candidates receiving the greatest number of votes in the Electoral College where no candidate has a majority; or (b) for the information of Congress in counting the electoral vote, is shown by the following:

Such a theory fails to distinguish between the function of the House of Representatives in judging the qualifications of an individual who is himself a candidate for a distinctly national office, that of President, and that to which the Federal Corrupt Practices Act relates, which seeks to regulate the activities of citizens seeking to influence the election of presidential electors, whom this court has declared to be non-Federal officers. These are essentially different.

It is only fair to direct the attention of the Court to developments since this indictment was returned which are matters of public record and of which it may take judicial notice. Since the returning of this indictment the Select Committee of the Senate appointed to investigate Senatorial campaign expenditures, after hearing testimony from eminent authorities on constitutional law, submitted its final reports to the 72nd Congress, S. Report No. 20, accompanying S. 2316, 72nd Congress, p. 977, Cong. Rec., in which the committee, submitted to the Senate an entirely new bill that would expressly repeal the present Federal Corrupt Practices Act of 1925. In the Committee report, No. 20, p. 8, it was said:

> "The most important **departure in principle** from the corrupt practices act of 1925 lies in the fact that the present bill seeks to center the responsibility for campaign expenditures upon such can-

didate or his agent and prohibits all those who are not properly authorized by the candidate or his agent from receiving contributions or making expenditures.

"Under this plan the **candidate becomes legally responsible for the expenditures of all persons and committees whom he or his agent has authorized to act in his behalf,** while all unauthorized persons and committees receiving contributions or making campaign expenditures become subject to the penalties provided in the bill.

"Previous legislation has been directed toward the control of expenditures made in connection with the choice of presidential electors. **The present bill proceeds on the theory that the offices of President and Vice President of the United States are Federal offices, the protection of which from the taint of corruption is of supreme importance to the welfare of the Nation."**

Note the expression used by the committee, "departure in *principle*" in distinguishing between the present act and the proposed law. Here the committee makes the distinction between legislation which attempts to regulate acts influencing the appointment of presidential electors, a matter which is entirely reserved to the Legislatures of the states, and the right of Congress to legislate with respect to the activities of an individual who is himself a candidate for a distinctly Federal office, such as that of President or Vice President of the United States. A statute designed to show the activities of the candidate for President and of those he authorized to associate with him might be appropriate as furnishing information upon which the House of Representatives might act in the event it is called upon to elect.

The provisions of the present Federal Corrupt Practices Act relating to presidential electors does not apply to a candidate for the office of President. It

relates only to a candidate for presidential elector. It does not even require that the treasurer of a political committee shall designate the name of the presidential candidate in whose interest it collects and expends money, as, indeed, it could not, since any presidential elector, under the electoral system, is constitutionally free to vote for any person he may see fit. Therefore, since the act does not require and, in fact, could not require the activities of the citizen working for electors to be related to a particular presidential candidate, how can authority for the requirement of the filing of reports of the voluntary acts of citizens supporting presidential electors, for which activities the presidential candidate may not be in any way responsible, be implied on the theory that it affords a means of determing the fitness of the person for whom the House of Representatives is to vote for President? The activities of citizens required to be reported relate to acts undertaken to influence the election of a candidate for an office filled by the state while the duty of the House to judge of the fitness of a presidential candidate relates to an entirely different individual who is a candidate for a Federal office.

The true nature of the electoral system completely refutes the government's contention. The founders of the government intended that each state should appoint presidential electors in such manner as the Legislature might direct to cast the vote of the people of the state for President. They were to be, as Hamilton declared in the Federalist, No. 68, "independent electors," who should meet and vote for President and Vice President, at least one of whom should be from a different state from themselves.

Miller, United States Constitution, 149.

Rawle, Constitution, 55.
Story, Constitution, Sec. 1473.

In speaking of the failure of the electoral system to operate as the framers of the Constitution anticipated, this Court said:

> "But we can perceive no reason for holding that the power confided to the states by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recognize the doctrine, that because the Constitution has been found in the march of time to be sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arizing in their time, it may therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."
>
> McPherson v. Blacker, 146 U. S. 1, 13 Su. Ct. Rep. 3, 36 L. Ed. 869, 877.

That the existence of such an implied legislative power is not essential to the integrity of the government is shown by the fact that for 136 years the Congress of the United States never undertook to require a report of the contributions and expenditures made to influence the selection of presidential and vice presidential electors. This was pointed out in Fitzgerald v. Green, where it was said:

> "Congress has never undertaken to interfere with the manner of appointing electors, or where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States."

Fitzgerald v. Green, 134 U. S. 377, 10 Sup. Ct. Rep. 586, 33 L. Ed. 951, 953.

The framers of the Constitution contemplated that the states should regulate and punish the acts of citizens improperly influencing the selection of electors who are to cast the vote of the people of the state for President. Many states have done so. Some have failed or refused to do so. Ratification of the Constitution would probably have been defeated had any such broad claim of right of the Federal government to prescribe how citizens may associate for political action in choosing a state's electors been suggested at that time.

The provisions of the Federal Corrupt Practices Act relating to presidential electors cannot be regarded as a mere publicity requirement, as the government insists, for the reasons:

(a) It prescribes the only methods by which any organized activity of citizens involving the expenditure of money may be conducted in connection with the selection of presidential electors, with certain exemptions hereinafter referred to.

(b) The organized effort of citizens involving the contribution and expenditure of money in the circumstances to which the act applies can be done only through the medium of a "political committee."

(c) It prescribes how the political committee shall be constituted. It must have a chairman and a treasurer.

(d) It makes it the duty of any individual who receives money "for a political committee" to account for it to the treasurer within five days. The failure to do so is an indictable offense.

(e) It prescribes how the accounts of the political

committees are to be kept; that receipts and vouchers covering the expenditures in excess of $10 shall be preserved for a period of two years.

(f) It makes a difference in pains and penalties between the contributions and expenditures made to regularly organized political parties, the local committees of which are exempt from keeping accounts or making reports. Other organized citizens active in two or more states, if they are a branch of a national committee, association or organization, are required to appoint a committee, keep account, and file reports.

(g) Branches of organized political movements expending money in the selection of presidential electors in two or more states are exempt if they are part of a movement sectional in character and not a branch of a national committee, association or organization.

(h) It prohibits and penalizes not simply the failure to report contributions and expenditures to the clerk of the House of Representatives (which is the publicity feature of the act) but the acceptance of contributions or the making of expenditures until a political committee has been appointed.

(i) It prohibits absolutely any corporation whatsoever from making a contribution to influence the selection of presidential electors. This has nothing to do with publicity. This is clearly legislation regulating acts affecting the appointment of electors and applies regardless of whether the corporation is created by Federal or state legislation.

By prescribing how a political committee is to be organized and fixing the only medium through which the organized political activities of a citizen in the state under the circumstances covered by the act can be conducted, it invades the prerogative vested by the Constitution in the state Legislature to determine the

manner of appointment of electors and to regulate the acts of citizens influencing their appointment, and may give rise to conflicting regulations.

That the Federal Corrupt Practices Act respecting elections does conflict with state regulations on the subject is clearly illustrated by the case of the laws of Alabama.

The Alabama Corrupt Practices Act, found in the Code of 1923, Secs. 582-600, relating to corrupt practices, provides for publicity of contributions and expenditures made to influence the election of presidential electors. That this act applies to presidential electors is shown by the fact that Sec. 586 limits the amount which may be expended by a candidate for the office of presidential elector to the sum of $100.00. Sec. 582 defines a political committee. Under that section, any one or more persons who shall be elected, appointed, chosen or associated for the purpose wholly or in part, in directing the raising, collection or disbursement of money used or to be used to further or defeat the election of any person to public office is declared to be a political committee. Sec. 588 requires that any candidate, within five days after the announcement of his candidacy, if the office be a state office, shall file with the secretary of state the name of not less than one nor more than five persons selected to receive, expend, audit and disburse all moneys contributed, donated, subscribed or in any manner furnished or raised for the purpose of aiding or promoting the election of such candidate, together with a written acceptance or consent of such person to act as such committee. But any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose. By Sec. 591 it is provided that "All contributions, donations and subscriptions made for

or on behalf of any candidate shall be made to the committee named by such candidate." By Sec. 593 is required the filing of reports of contributions and expenditures with designated state officials on specified dates.

Contrast this with the Federal Corrupt Practices Act of February 28, 1925. By Sec. 242 of that act it is declared that no contribution shall be accepted and no expenditure made by or on behalf of a political committee for the purpose of influencing an election until a chairman and a treasurer shall have been chosen. That act expressly requires that every political committee shall have a chairman and a treasurer.

It is respectfully submitted, therefore, that if the provisions of the Federal Corrupt Practices Act are constitutional, then either one or two things follow: That where money expended to influence the election or defeat of a candidate for presidential elector in that state by an organization which is a branch or subsidiary of a national organization other than a regular party committee, such candidate for presidential elector may not serve as his own political committee and he cannot designate a single individual to act as his committee, as the law of Alabama expressly provides, since under the Federal law every political committee must have a chairman and a treasurer. From this it must follow, therefore, that either the Federal Corrupt Practices Act is unconstitutional because it clearly interferes with the method prescribed by the state of Alabama for regulating publicity regarding contributions and expenditures made to influence the election or defeat of presidential electors, or the state law governing the constitution of such committees and publicity regarding their activity is invalid. There can be no concurrent operation of the two since they are squarely in conflict.

Sec. 254 of the Federal Corrupt Practices Act can have no application to such a situation since it provides only the rule of construction where the Federal act conflicts with the laws of a state relating to the nomination or election of candidates, and the Federal act by the definition of the term "candidate" in Sec. 241-b excludes presidential electors from that term. It refers only to candidates for Senator or Representative or Delegate or Resident Commissioner in Congress.

As to them the Constitution expressly provides by Art. I, Sec. 4, that "Congress may at any time make or alter such regulations" relating to the times, places and manner of holding elections for Senators and Representatives. This is an instance of an irreconcilable conflict between Federal and state laws relating to publicity concerning acts of citizens affecting the election of presidential electors.

Furthermore, Sec. 243 of the Federal Corrupt Practices Act requires that the treasurer of a political committee shall preserve all receipted bills and accounts for at least two years from the date of the filing of the statement containing these items. What is the situation where the state law may prescribe a different period? Which act takes precedence, the state publicity requirement, or the Federal? These are but a few concrete illustrations of the conflict which necessarily arises out of invoking the doctrine of implied power in Congress with respect to a subject matter which has by the Constitution in express terms been committed to the states and which has been held by this Court to be a state function.

The implication arising from the construction contended for by the government, viz., the Federal legislation regulating the organized acts of citizens seeking to influence the selection of presidential electors may be valid insofar as it does not conflict with the

power committed by the Constitution to the state to appoint electors and to regulate and punish the acts of citizens influencing their appointment, gives rise to an anomalous situation under which a Federal law may be valid only so long as a state fails to act with respect to the subject matter or it does not conflict with the provisions of a state law on the subject. This completely reverses the accepted principles of constitutional law and indicates the fallacy of seeking to justify the existence of an implied power over a subject matter committed by the Constitution to the states. The Constitution of the United States, Art. VI, declares "The Constitution and the laws of the United States which shall be enacted in pursuance thereof shall be the supreme law of the land." By every canon of constitutional construction, therefore, if an implied power exists in Congress to enact publicity legislation relating to the acts of citizens influencing the election of presidential electors, then that power should be paramount and should not be required to give way whenever any conflicting state legislation regarding how a political committee shall be constituted may arise, as suggested in the case of Alabama.

THE DUTY OF CONGRESS TO COUNT THE ELECTORAL VOTE, AS PRESCRIBED IN ORIGINAL ART. II, BUT NOW BY THE TWELFTH AMENDMENT, CONFERS NO AUTHORITY TO REGULATE THE ACTS OF CITIZENS AFFECTING THE APPOINTMENT OF ELECTORS WHO ARE TO CAST THE VOTE OF THE PEOPLE OF THE STATE FOR PRESIDENT.

The extent of the power of Congress under this section has not been judicially settled. The weight of precedent is against the contention that this confers any implied authority to regulate the circumstances under which the primary vote for electors is

cast. The Electoral Commission, appointed in 1877 to settle the dispute in the Hayes-Tilden contest, found:

> "There exists no power in this Commission and there exists none in the two Houses of Congress in counting the electoral vote, to inquire into the circumstances under which the primary vote for electors was given."

The instances in which objection has been made in Congress to counting the electoral votes of states are collected in Hinds' Precedents of the House of Representatives, Chap. LXI. These show that where Congress has rejected the electoral votes of the states it has been where the infirmity could be established by examination of the certificate itself, such, for example, as: (a) Where an elector was constitutionally ineligible by reason of holding a Federal office; (b) where the certificate showed the vote to have been cast upon a date other than that constitutionally prescribed; (c) where the question was whether a state had been legally admitted to the Union; (d) or which or two conflicting certificates represented the state; (e) or where the candidate voted for as President was dead when the vote was counted. In such instances Congress has, in the discharge of its constitutional function to count the vote, determined whether a particular vote should be counted. These are matters, however, determinable from the certificate, without the necessity for examining the circumstances under which the primary vote for the elector was cast. The present law (Sec. 6, Title 3, U. S. C., Act of Feb. 3, 1887, recognizes state authority to settle controveries respecting electors. Congress has repeatedly disavowed such a right. It is submitted, therefore, that the function of Congress to count the electoral vote gives it no implied authority to under-

take to regulate acts of citizens affecting the circumstances under which votes in a state for an elector are cast, as is attempted to be done by the Federal corrupt Practices Act of 1925.

IT IS COMPETENT FOR THE COURT IN CASE OF THE EXERCISE OF DOUBTFUL CONSTITUTIONAL POWER BY CONGRESS TO EXAMINE THE REPORT OF THE COMMITTEE AND THE EVIDENCE UPON WHICH CONGRESS ACTS, WHICH, IN THE INSTANT CASE, ARE SUFFICIENT TO OVERCOME THE ORDINARY PRESUMPTION OF CONSTITUTIONALITY OF THE STATUTE.

The facts with respect to the origin and history of the Federal Corrupt Practices Act of 1925, if examined, are clearly sufficient to overcome any presumption of the constitutionality of the act, so far as it relates to presidential electors. The present act, with the exception of a slight change in Sec. 302 (c) is identical in language with what was known as the Cable Bill, reported on May 13, 1924, by Mr. Cable from the Committee on Election of President, Vice President and Representatives in Congress, H. R. 8956, accompanied by House Report No. 721, 68th Congress, First Session. (Cong. Record, p. 8496). The report submitted by Mr. Cable does not refer to the provisions of the bill relating to presidential electors, nor do the printed hearings of testimony upon bills upon the subject pending before the committee indicate any discussion of the matter.

Shortly after the Cable Bill had been reported in the House, when S. 1898, a bill to readjust the compensation of employees in the postal service, was under consideration in the Senate, Mr. Borah offered an amendment in the nature of a rider to that bill to provide a Federal corrupt practices act which was adopted by the Senate. (Cong. Record, p. 9516). This amendment contained no reference to presidential electors or

contributions made to influence their appointment. At that time Mr. Borah said, concerning the scope of his amendment:

> "It covers, in my opinion, all that we can cover under the decision in the Newberry case. It covers the election of all Federal officials. It does not cover, of course, the election of State officials nor can it do so." (Cong. Record, p. 9515.)

Senator Walsh, of Massachusetts, also said at this time:

> "I agree the Federal authority is limited. I believe the best way to reach the election abuses is through State legislation, because it is doubtful if you can pass a Federal law unless it applies to committees interested in elections being held in more than one State. You have to have it apply to political committees taking part in the election in two or more States. OF COURSE, WE CAN PASS CORRUPT PRACTICES LAWS THAT APPLY TO THE ELECTIONS OF SENATORS AND REPRESENTATIVES ONLY. * * *
>
> "I think the field in which the National Government can legislate on this subject is somewhat limited. It is my opinion that the State governments have very nearly absolute control over the manner of electing presidential electors, Senators, and Members of the House of Representatives. I think it is largely, if not solely, a State function. Most of the States have passed corrupt practices acts dealing with the question, but these laws are not uniform and apparently are rarely enforced." (Cong. Record, p. 9514, 1915.)

Because of disagreeing amendments between the Senate and House, the Postal Bill was sent to conference. The report of the conferees was submitted in the Senate on June 5, 1924, (Cong. Record, p. 10 613) and in the House on June 6 (Cong. Record, p. 11 015). The report

of the Committee on Conference appointed by the two houses shows the conferees substituted for the Borah amendment the provisions of the Cable Bill which had been reported in the House shortly before from the Committee on Election of President, Vice President, and Representatives in Congress, the only change made by the conferees being in what is now Section 241 (c) of the law as finally drafted.

The Cable Bill, as reported in the House, in Sec. 2 defined the term "political committee" as follows:

> "(c) The term 'political committee' includes any committee, association, or organization, which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence in two or more States the election of candidates or presidential and vice presidential electors."

For which the conferees substituted the following (now Sec. 241 (c) of the present Act):

> "(c) The term 'political committee' includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization."

At the time of the submission of the conference report Mr. Moses declared:

> "I think that putting a rider of any sort on a bill such as the postal salaries bill is an entirely inexcusable method of producing legislation, how-

> ever desirable. In the last days of the session, with a great bill here in which every Member of both Houses of Congress is deeply interested, affecting the interests of more than 300,000 Government employees, a bill to which substantially every Member of the Senate and substantially every Member of the House has given his approval, a bill representing the result of work and labor on the part of a joint subcommittee which spent days in taking testimony exhaustively—to put into the bill anything like the Cable bill, comprehensive in its subject matter and to which we have had no time to give attention in committee or the Senate to examine, I maintain is an entirely indefensible method of producing legislation of that sort. I want my personal position to be made known. * * *
>
> "I am opposed to this method of producing this kind of legislation; but if I have to take this method of legislation in order to get relief for the men in the Postal Service, I will take it. However, that is not going to prevent me from making my protest against the legislation." (Cong. Record, p. 10, 620.)

The conference report was adopted by both Houses, agreed to in the Senate (Cong. Record, p. 10, 652) and in the House (Cong. Record, p. 11017), was sent to President Coolidge for his signature. He vetoed the measure on account of the postal salary increase, saying with respect to the corrupt practices provision, "If that provision stood alone I should approve that part of the bill relating to campaign funds." (Cong. Record, p. 11, 128, June 7, 1924). The bill failed to become law.

At the second session of the 68th Congress the House Committee on Election of President, Vice President and Representatives in Congress conducted hearings on H. R. 10,268, a bill by Mr. Cable to provide for the choice of an officer to act as President in the event the President and Vice President should not have been elected

and qualified as provided by law. At that time the Hon. Wm. Tyler Page, then clerk of the House of Representatives, who has made a study of the electoral system, testified before the committee regarding the process of the election of President. He said, regarding the power of the State legislatures over the appointment of presidential electors:

> "We speak of the electors in the States as the 'Electoral College.' This term was first used about the year 1800 and in 1845 it appeared in legislation. It is therefore an official term. The Electoral Colleges were intended to be the exact counterpart of the joint convention of the two Houses of Congress in the representations of the State as units, as well as the population of the States. We have seen that electors were to be appointed in such manner as the State legislatures may direct. **This power was to be absolute.** A State, if it chose, could vest the appointment of electors in a turnpike corporation or any other set of individuals; and as a matter of fact in our early years under the Constitution in many of the States presidential electors were not elected at all but were APPOINTED BY THE LEGISLATURES. South Carolina was the last State to give up the practice of appointing. This she did in 1868, and since that time electors in all of the States have been chosen by the people on a general ticket. Two are known as presidential electors at large, corresponding to the number of Senators from each State, and the remainder equal in number to a State's Representatives, are selected from but not by congressional districts."

He further said:

> "The States have **absolute control** of the appointment of electors to fill vacancies, to settle controversies as to the qualifications of electors, and other disputed matters. But Congress in the act of 1887 declared that they would not recognize

the determination of States made after a certain date. In justification of this it was asserted that Congress did not attempt to determine disputes but simply to state what evidence it would receive as conclusive to a determination. AT BEST THE LAW IS OPEN NOT ONLY TO SERIOUS CONSTITUTIONAL OBJECTION, BUT TO THE CRITICISM THAT IT LEAVES UNSETTLED A NUMBER OF POINTS THAT IN THE FUTURE MAY EASILY LEAD TO SERIOUS DISPUTES. Pickney, of South Carolina, one of the most prominent members of the Constitutional Convention, said he well remembered that it was the object of the convention to give to Congress no interference in or control over the election of the President; that it would not have been safe to have given Congress the right to object to any votes or even to question whether they were constitutionally or properly given. It is under this same act of 1887 that the whole machinery is set up for the certification and counting of the electoral vote, except as provided in the twelfth amendment. And should this act ever be found to be unconstitutional much confusion would result. Nothing short of a constitutional amendment can supply the omissions which time has revealed." (Capitals, heavy face ours.)

The agitation for the enactment of a Federal Corrupt Practices Act continued in the second session of the 68th Congress, and on January 29, 1925, Mr. Walsh, of Massachusetts, when S. 3674, another bill to reclassify the salaries of post masters and employees of the postal service was pending in the Senate, offered as a rider to that bill an amendment in the language of the Cable Bill as it had been embodied in the former postal salaries bill that had been vetoed by the President. (Cong. Record, p. 2627). The amendment was adopted with practically no discussion. No mention was made of the provisions of the bill relating to presidential electors although it will be recalled that

Mr. Walsh, himself, had expressed doubt at the former session regarding the power of Congress to legislate upon matters affecting the appointment of presidential electors.

Later, when H. R. 11,444, providing for salary increases of postal employees was reported in the House by Mr. Kelly from the Committee on Post Offices and Post Roads, which is found printed in the Congressional Record of February 10, 1925 (p. 3419) it contained no reference to corrupt practices. The bill passed the House and went to the Senate, where it was referred to the Senate Committee on Post Offices and Post Roads, (Cong. Record, p. 3479) was duly reported, and when it came before the senate in Committee of the Whole, there was offered an amendment which substituted for the entire House bill the text of S. 3674, which had passed the Senate on January 29, 1925, and which contained the rider providing for a Federal Corrupt Practices Act. On this occasion the amendment was not even so much as read. Mr. Moses said:

> "I ask unanimous consent that the formal reading of the committee amendment may be dispensed with. My reason for asking that is that the amendment which the committee proposes is the entire bill, which was adopted by the Senate after eight days of close debate, and with all of the items which were then passed upon by the Senate. The provisions are so thoroughly familiar to the Members of the Senate I think the request may be acceded to." (Cong. Record, p. 3826.)

The bill was sent to conference and finally passed in the Senate (Cong. Record, p. 4697-4707) and in the House (Cong. Record, p. 4655), was sent to the President, signed, and became P. L. 506 of the 68th Congress.

The history of this legislation shows that is was passed without any discussion whatsoever of the vital

constitutional question involved, also that those who sponsored the proposal expressed serious doubts as to the constitutional power of Congress. Some time before this, in the 66th Congress, on March 26, 1920, Senator Pomerene, of Ohio, a distinguished constitutional lawyer, in speaking of the power of Congress to control the appointment of presidential electors, declared:

> "I share the Senator's detestation, if I may use that word, of the large expenditure of money in elections, and I want to join hands with the Senator in trying to remedy this situation, if it can be done; but I wish to ask the Senator this question: Has he investigated sufficiently to determine, in his own mind, what, if any, constitutional authority Congress has to deal with the subject of presidential primaries of election? Before the Senator answers that question, if he will permit me to make an observation or two, I desire to say that it is no question about our right to control primary or general elections so far as they relate to Representatives in Congress and to Senators, but **our courts have held at various times that a presidential elector was not a Federal officer; that he was a State officer, and that the State Legislatures have the right to provide for their appointment. That has been construed to mean either appointment by the legislature or by election. They are now elected by popular vote.**
>
> "I recognize the fact that Congress has the right to determine the time of choosing the electors and the day on which they shall cast their vote, which day shall be the same throughout the United States.
>
> "I had occasion a couple of years ago when this matter was engaging the attention of the committees to look into the question of the right of Congress to control presidential primaries. **I know that that matter was given very serious thought by some of the ablest lawyers of this body, and at that time we were of the opinion that we could**

not control the presidential primaries. I have not had the opportunity to examine the bill which has been presented by the Senator from Idaho, though I heard it in part read. It may be that it is builded upon some different theory. I hope the joint investigation of Senators will lead to a conclusion that there is this power. I present the subject now so that I, for one, may have the benefit of the Senator's views. If there is no such authority, then there ought to be an amendment to the Constitution to cover the case." (Cong. Record, p. 4856-4857.) (Heavy print ours.)

19. SEC. 251, PROHIBITING CAMPAIGN CONTRIBUTIONS BY CORPORATIONS, UNCONSTITUTIONAL IN PART.

The words, "presidential elector," appear in the Federal Corrupt Practices Act of 1925 in only two places, first in Sec. 241 (c) defining a political committee, hereinbefore discussed, and again in Sec. 251.

Section 241 (c) of the present Corrupt Practices Act of 1925 marks the first attempt by Congress to enact a publicity requirement with respect to contributions made to influence the election of presidential and vice-presidential electors. All former legislation respecting Corrupt practices having been confined to matters affecting the election of members of Congress, with the single exception of the act of January 26, 1907, (chapter 420, 40 Stat. L. 864,) prohibiting contributions by corporations to influence the election of presidential electors, now carried in the present corrupt practices act as section 251 (U. S. C. Title III, Chapter 8). Sec. 251 provides:

> "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political office, OR FOR ANY CORPORATION WHATEVER to make a

> contribution in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section." (Capitals ours.)

The act attempts to prohibit any corporation whatever from making a contribution in connection with an election in which presidential and vice presidential electors are elected. This section of the act is not involved in the indictment in the instant case, but the constitutional power of Congress to enact it, so far as it applies to CORPORATIONS CHARTERED BY THE STATE, is precisely the same as that involved in requiring a report of contributions made by individuals to influence the election of presidential electors. It will be noted that Congress does not require individuals to make any report of contributions to influence the election of presidential electors (See Sec. 245 of the Federal Corrupt Practices Act of 1925). Individuals are required to report contributions only when made to influence the election of "candidates" in two or more states and the term "candidate" is defined by Sec. 241 (b) to mean a candidate for Congress.

The constitutionality of the act prohibiting contributions by corporations has never been before the United States Supreme Court and its provisions have rarely been invoked. It bears upon its face, however, evidence that its framers appreciated that it might be unconstitutional in part, for after prohibiting contributions by any corporation organized by the authority of any law of Congress, it goes further and attempts to prohibit contributions by any corporation whatever. The authority of Congress to regulate corporations created by Fed-

eral law cannot be successfully disputed. The framers of the act, therefore, made its prohibitions apply to them specifically, and then followed with the general language, "any corporation whatever." If there had been no doubt in the mind of the draftsmen regarding the power of Congress over **all corporations**, the distinction between corporations chartered by national law and state corporations would not have been made and the language "or any corporation whatever," would have been superfluous.

The act would simply have prohibited any corporation from making a contribution to influence the election of members of Congress or presidential and vice presidential electors. It is apparent that the act was purposely made severable. As Congress has no power over the appointment of presidential electors and no power over corporations created by the States, the act is clearly unconstitutional as to them, though it is unquestionably valid in so far as it applies to corporations created by Federal law.

The only case in which the constitutionality of this act has been before the courts is in United States v. United States Brewers Assn., 239 Fed. 163, 169, where it was said:

> "The fourth reason assigned against the validity of the act is that it tends to prohibit, make criminal, and punish money contributions made to a candidate for a state office, or to the agent for such candidate, or in connection with his election. As I understand defendants' position, this reason is based on the use of the words 'any election at which Presidential and Vice Presidential electors' are 'voted for.'
>
> "If it should be held that Congress exceeded its power in including, among others, elections in which Presidential and Vice Presidential electors are to be voted for, on the ground that they are

officers of the state and not of the federal government, that would not, in my opinion, invalidate the act except as to that particular provision.

"If that which is unconstitutional can be separated from that which is not, the one may be rejected, and the other retained. This rule is recognized in U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563, and U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550, cited in briefs of defendants' counsel.

"On the whole, I am of opinion that, in enacting section 83, Congress kept within its constitutional powers. Were I in doubt upon this question, I would resolve that doubt in favor of the constitutionality of the act." (United States v. United States Brewers Assn., 239 Fed 163, at 169.)

This case did not settle the question of the constitutionality of the act in so far as it related to presidential electors, for the indictment in that case charged contributions by the Brewers Association to influence the election of BOTH MEMBERS OF CONGRESS AND PRESIDENTIAL AND VICE PRESIDENTIAL ELECTORS, and as the question came before the district court on demurrer to the indictment there was ample ground upon which the district judge could justify his action in sustaining the indictment and overruling the demurrer. While there is some language used by the district judge in that case indicating that he regarded the act as constitutional, it is purely dictum and is not conclusive of the question.

The unconstitutionality of that portion of the act of 1907 which prohibits any corporation whatsoever from making a contribution to influence the election of presidential electors did not escape notice in Congress. When the bill, S. 4563, was pending before the House on January 21, 1907, (Cong. Record, 59 Cong., 2 Sess., p. 1453) Mr. Mann, of Illinois, one of the ablest constitutional lawyers in that body, said:

"I am not in favor of the passage of this bill for two reasons. First, I do not believe that the Government of the United States has the constitutional authority to regulate and control all of the elections in the country. * * *

Mr. Kiefer, of Ohio, said:

"But we are all now on a virtuous footing. Substantially all of us, I think, are going to vote for this bill, although it has elements in it that suggest that it may be unconstitutional. The election of Members of the House of Representatives in the different States or in the general assemblies of the different States is pointed out as one of the cases where contributions are not to be made to aid in securing the election of anybody. How that comes within the purview of the Constitution I do not know. It is even doubtful about our right to prohibit corporations from making contributions to control elections of the Members of this House. Under section 4 of Article 1 of the Constitution we find this provision:

"'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.'

"The effect of this article and its construction is considered in Ex parte Seibold (100 U. S. 371, 382-385).

"How are we by law to provide against contributions unless we have assumed to do that which we might do under the last clause of this section 4, to regulate the election of Representatives in different States. I only make this suggestion in the line of having it understood that while I vote for the bill I do it with the mental reservation as to the constitutionality of it."

Mr. Robinson, of Arkansas, now United States Sena-

tor from that state, said:

> "I have had no opportunity to investigate the constitutional features or the unconstitutional features of this bill, but I want to say that the political history of this Republic during the last few years has emphasized the necessity for some such legislation as is provided for in this measure.
> * * *

The only other acts passed by Congress relating to the appointment of presidential electors are those referred to in the several Civil Rights Acts intended to protect citizens against the discriminations covered by the XIVth and XVth Amendments. These are passed pursuant to a specific section in the constitutional amendments themselves authorizing Congress to enact appropriate legislation and rest upon an entirely different footing from the Federal Corrupt Practices Act, for which there is no constitutional authorization and which attempts to regulate acts affecting the appointment of presidential electors, a matter which is expressly reserved to the people of the States to be exercised as the State legislature may direct.

THE MAJORITY OPINION MISCONSTRUED THE STATUTE IN HOLDING INDICTMENT SUFFICIENT

The question of statutory construction involved upon demurrer to the indictment was whether Congress intended by the Federal Corrupt Practices Act of 1925, to hold the treasurer of a political committee criminally liable for failing to report to the Clerk of the House of Representatives indirect contributions, not to the committee, but "for the committee" without any allegation that the contribution was ever received, or accepted by the committee or any agent thereof or that the treasurer had knowledge of the contribution.

The contention of petitioners is that the Federal

Corrupt Practices Act of 1925, in Sec. 241. (c) Title 2 U. S. C. defines a political committee as one which accepts contributions for the specified political purpose. Contributions are then divided into two classes: 1st. Direct contributions, those made directly to the committee. No such contribution is charged in this case. 2nd. Indirect contributions, those made for the committee. The distinction between direct and indirect contributions is clearly made in Secs. 242, 243, and 244. Sec. 242 requires that before contributions are accepted a political committee shall be appointed, which is required to have a chairman and treasurer. It makes it the duty of the treasurer of a political committee to keep a detailed and exact account of all contributions made to or for such committee. This is followed by Sec. 243, which defines the method by which indirect contributions, those made for the committee, are accounted for to the treasurer. Following this is Sec. 244 (upon which the indictment is based), defining the duties of a treasurer of a political committee with respect to the filing of reports of contributions with the Clerk of the House of Representatives. This section requires reports to be made of contributions: 1st, To the committee; 2nd, For the committee. Since Sec. 243 immediately preceding is the one which defines what is meant by a contribution "for the committee," the only logical and reasonable interpretation of the section is that the contributions "for the committee" which Congress intended that the treasurer should report are those accounted for to the treasurer as provided in Sec. 243.

Sec. 243 reads:

> "Accounts of contributions received. Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of

such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

Contributions made for the committee which the treasurer is required to report are those which come into existence as provided in Sec. 243, and the duty of the treasurer to report with respect to such contributions is contingent upon whether there has been an accounting to the treasurer for such contributions, or other facts giving rise to the duty of the treasurer to demand an accounting. As to indirect contributions, therefore, it clearly never was the intention of Congress that the treasurer of a political committee should be indicted and prosecuted merely upon the bare allegation that some person made a contribution for the committee without alleging that the recipient accounted to the treasurer for the contribution or other facts which imposed the duty upon the treasurer to demand an accounting of the recipient of the contribution made for the committee.

It is plainly apparent from Sec. 243, that, as to indirect contributions, Congress intended that there should be an accounting to the treasurer of the political committee, and the duty of the treasurer to report cannot arise unless there is alleged and proved either that the party who received the funds accounted to the treasurer, or facts giving rise to the duty upon the part of the treasurer to demand an accounting of the recipient. Neither of these allegations is made in the indictment in the instant case. If the statute be construed to mean that the treasurer of a political committee can be held criminally liable, even to indictment for felony, for failure to report a contribution made for the committee without alleging that the contribution in question was ever accounted for to the treasurer, or other facts giv-

ing rise to a duty upon the part of the treasurer to demand an accounting, then such a construction would render the statute of doubtful constitutional validity.

Chaplin Refining Co. v. Corporation Comm, 286 U. S. 210, 76 L. Ed. 1062.
United States v. L. Cohen Grocery Co., 255 U. S. 81, 89, 65 L. Ed. 516.

Under the theory held by the majority of the Court of Appeals respecting the criminal liability of the treasurer of a political committee to account for contributions not made to it but to others for it, it results that control as to liability to criminal prosecution would be removed entirely from the committee and be placed solely with persons in no way related to, or even known to the committee. If the construction contended for by the Government is correct, the liability of the treasurer of a political committee to prosecution would depend not upon the knowledge which imposes an obligation upon the treasurer to report, but alone upon whether someone made a contribution to any person for the committee, and on this latter theory the treasurer could be indicted even if such treasurer did not know of it.

Consider what would follow if such a construction were allowed to stand. The political enemies of a committee could make a contribution to a third person without its knowledge, render no accounting to the treasurer of the committee and if the treasurer failed to report it, secure his indictment and prosecution. Or a corporation, which is prohibited by law from making contributions, could make a contribution to a third person for a political committee, never account for it to the committee, or authorized or accepted by it, and the treasurer of the committee be subsequently indicted and prosecuted for failing to report

a contribution which it never accepted and as a matter of law it could not accept. Or, if a person made a contribution to some one for a political committee, although the person receiving it was not authorized to solicit funds, and the recipient pocketed the money and appropriated it to his own personal use, under the construction insisted upon by the Government the treasurer of the political committee could be indicted and prosecuted.

The majority opinion holds that the government may indict the treasurer of a political committee and place her upon trial upon the bare allegation that some one made a contribution for the committee, and this without alleging to whom the money was paid, that it was ever accepted by the committee or that she had knowledge of it.

Not only that, but the majority opinion declares, "It will always be presumed, however, that the treasurer possesses knowledge of contributions which are made to or for the committee." Under such a construction of the statute the government upon trial if it proved the allegation of the indictment would be entitled to an instruction to the effect that the treasurer of a political committee is presumed to know of all contributions made "for the committee," although it had neither alleged nor proved that the contributions were received, or accepted, to whom they were made or that they were paid to any agent of the committee which is the very corpus deliciti of the offense. The responsibility of a treasurer of a political committee is to report only contributions accepted or used by the committee.

By a careful study of the majority opinion just quoted, creating a presumption of guilt, it will appear to the Court that in order to establish his innocence a defendant charged with crime must show a bona fide

exercise of reasonable care and diligence in the performance of the duties of the office. Since good faith is a personal defense based largely upon the mental processes and the motives actuating the defendant, and since no one can explain those motives except the defendant, and since no one else has knowledge of whether or not a given action was taken in good faith, the action of the Court in writing into the Corrupt Practices Act a requirement that the defendant must show his good faith by showing the exercise of reasonable care and diligence in the performance of the duties of his office, (i. e., in ascertaining when, by whom and how contributions were made to his committee,) amounts to a requirement that in order to show such good faith the defendant must take the stand and testify, whether or not any evidence had been adduced to show bad faith, breach of duty, or breach of obligation to report contributions. Otherwise, under the majority opinion, the trial Court might hold and charge that the **presumption of knowledge** written into the Corrupt Practices Act by the majority opinion was tantamount to being guilty, as charged, unless and until the defendant assumed the burden of proving his innocence and overcoming this presumption. To maintain this position, we submit, means an utter disregard of the fundamental presumption of innocence which belongs to every defendant and which attends him throughout the case.

This would be a direct violation of the rights of the defendant under the Vth amendment to the Constitution, reading as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

> for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against, himself.** nor be deprived of life, liberty or property, **without due process of law**; nor shall private property be taken for public use, without just compensation."

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746.

The Corrupt Practices Act nowhere in express terms creates any prima facie presumption. If such presumption arises it grows out of judicial construction. That such a presumption is wholly unjustified and would be in direct disregard of the plain provisions of the act is clearly indicated by the fact that Sec. 243 provides the manner by which the recipient is to give to the treasurer of a political committee the information requisite for the making of reports and keeping the accounts respecting contributions made "for the committee." This shows the Congress recognized that a treasurer of a political committee would not at all times have knowledge of contributions made "for the committee" when such contributions are not made "to the committee" or an agent thereof. It declares:

> "Every person who receives a contribution **for a political** committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution render to the treasurer a detailed account thereof."

The foregoing section of the Act unquestionably makes it the duty of the treasurer to demand an accounting of contributions made "for the committee" when the treasurer has knowledge of them, but it also provides for a situation where a contribution is made "for the committee" without the knowledge of the treasurer. In that case it is made the duty of the

recipient within five days to account to the treasurer therefor.

A treasurer can, of course, demand an accounting only when he has knowledge of the contribution made "for the committee." Because of this Congress made provision for the situation which arises where the treasurer has no knowledge by making it the duty of the recipient to report within five days.

It is submitted, therefore, that in view of this clear statutory recognition of the fact that there are circumstances under which the treasurer may have no knowledge of a contribution made by some one "for the committee," there is no justification for the creation of a judicial presumption of knowledge under all circumstances.

In a campaign of nation-wide scope, such as is involved in the election of a President of the United States, it is absolutely impossible for the treasurer of a political committee to know of every instance when some individual citizen, may make a contribution "for the committee" or expend money "on its behalf." The presumption can reasonably arise only when it is shown that it is made to the committee or some agent thereof. Therefore, the construction of the act adopted by the majority of the Court of Appeals creating a presumption against the treasurer, it is submitted, falls within the class of an unreasonable presumption preferred to in McFarland v. American Sugar Refining Co., 241 U. S. 79, 86, 60 L. Ed. 899.

It is respectfully contended that Mr. Justice Van Orsdel in his dissenting opinion has correctly interpreted the statute, saying:

> "The **corpus delicti**, or the body of the crime as laid in the statute, consists of a political committee, as defined therein, receiving funds, using them, and failing to make a detailed report there-

of to the Clerk of the House of Representatives. The indictment fails to allege that any funds ever came into the possession of the committee or any person connected with the committee. Thus it appears that the first essential element leading to the possible commission of the crime is lacking, and without possession there can be no distribution; hence, in the absence of these two fundamental elements, the failure to report is not a crime, since to meet the requirements of the statute there is nothing to report. The essence of the crime is failing to report money that came into the possession of the committee; and from whom received, and funds paid out by the committee, and to whom such payments were made. In other words, the indictment fails to charge the crime defined in the statute, or any offense whatever. It is an elementary rule of criminal pleading, that, until the fact that the crime has been actually perpetrated and proved, in the manner alleged in the indictment, there can be no conviction."

Or as Mr. Justice Proctor of the Supreme Court of the District of Columbia said in his opinion sustaining the demurrer:

"A consideration of section 244, in the light of all other related provisions of the act, leads fairly to the conclusion that the legislative intention is to require the treasurer of a political committee to report only contributions received by him and those duly reported to or accounted for to him. Certainly it was not intended to hold one criminally responsible for failure to report a contribution of which he had no knowledge. This is a proposition advanced by the government to which I cannot assent. It calls for an unreasonable and harsh construction which is neither warranted by the nature of the act, its language, nor its intent.

"Nor can I accept the alternative contention that those counts which charge a **wilful** failure by Burroughs to report contributions made **for** the committee impute to her knowledge of contribu-

> tions received by another. The term 'wilful,' as used in these counts, is merely an adoption of the word employed in section 252 to differentiate in the penalties between a purposed and intentional violation of the act and one occurring thoughtlessly or accidentally through inadvertence or mistake."

Even if the government were to prove every allegation made in this indictment it would not have established an offense under the act.

Because of the distinction made in the act between direct and indirect contributions the case cited by the Government relating to the sufficiency of indictments in general have no application.

The case comes within the rule laid down by this Court in United States v. Mann, 95 U. S. 580, 24 L. Ed. 531, 533, wherein this Court, quoting Chief Justice Marshall and Mr. Justice Story, declared:

> "Examples of the kind where it has been held that it is not sufficient to follow the words of the statute are quite numerous, and they show that many of the exceptions are as extensively recognized and as firmly settled as any other rule of pleading in such cases. Views of a corresponding character are expressed by this court in another case, where the opinion was delivered by Mr. Justice Story. Having stated the rule that it is in general sufficient to allege the offense in the very terms of the statute, he proceeds to remark: we say in general, for there are, doubtless, cases where more particularity is required, either from the obvious intention of the Legislature or from the known principles of law, both of which exceptional requirements are applicable in this case."

The indictment, not alleging to whom the several alleged contributions were paid, is clearly insufficient to permit it to be pleaded in bar.

CONSPIRACY COUNTS NINE AND TEN

With respect to these counts the government contends that scienter is clearly alleged by the words "each of said defendants then well knowing all the premises aforesaid unlawfully and feloniously did conspire * * and agree together" to commit the offenses charged in the substantive counts.

The only "premises aforesaid" which the appellees are charged with knowing is that E. C. Jameson made contributions "for the committee" on dates specified. It is nowhere alleged to whom the contributions were made, or paid, nor are any other facts set forth giving rise to the duty of the treasurer to demand an accounting and file report. The treasurer could not account for an indirect contribution until it had been accepted and accounted for to the committee. Even if it be assumed that the treasurer knew that E. C. Jameson had made a contribution, not to the committee but to someone for the committee, there was no way by which she could require an accounting since the statute imposes no duty in this respect upon the contributor. Section 243 places the duty of **accounting to the treasurer upon the recipient.** Therefore, as neither of these conspiracy counts nor any of the other counts alleges to whom the contributions were made, i. e., who the recipient was, they are fatally defective. The government further undertakes to supply the deficiency of allegations by asserting the words "did conspire" import to the treasurer knowledge of contributions. This plainly cannot be so since it might be true that the treasurer knew a contribution was made for the committee but not knowing the recipient could not demand an accounting and therefore under such circumstances a mere charge that the treasurer and the chairman agreed not to report the contribution would state no offense under the statute.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeal of the District of Columbia should be reversed for the reasons:

1. That the sections of the Federal Corrupt Practices Act of 1925 relating to presidential electors upon which the indictment is based are unconstitutional.

2. Should the legislation be held to be within the implied power of Congress, the indictment is insufficient to charge any offense under the statute properly construed.

Respectfully submitted,

ROBERT H. McNEILL,
Attorney for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 434

ADA L. BURROUGHS AND JAMES CANNON, JR., petitioners

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the issuance of a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the District Court sustaining the demurrer to the indictment here involved appears at page 21 of the record. It has not been reported. The majority and dissenting opinions in the Court of Appeals (R. 26 and 35) have not been reported.

JURISDICTION

The judgment sought to be reviewed was entered May 15, 1933 (R. 37). Motion for rehearing was

denied June 10, 1933 (R. 37). Petition for certiorari was filed in this Court September 6, 1933. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Corrupt Practices Act of February 28, 1925, is unconstitutional in so far as it requires reports of contributions received for the purpose of influencing the election of Presidential and Vice Presidential electors.

2. Whether the indictment states an offense.

STATEMENT

Petitioners were indicted in the Supreme Court of the District of Columbia under an indictment charging in separate counts failure to report contributions received for the use of their committee, and also with conspiring to commit such substantive offenses (R. 1 et seq.). They demurred to the indictment upon the grounds (1) that the statute upon which the indictment is bedded is unconstitutional, and (2) the indictment fails to state an offense (R. 18). The trial court sustained the demurrer because of the insufficiency of the indictment, and therefore found it unnecessary to pass upon the constitutional question (R. 21). On appeal the judgment of the trial court was reversed, the Court of Appeals holding that the statute is constitutional and the indictment valid (R. 26), one justice dissenting (R. 35).

DISCUSSION.

This case presents a constitutional question of general importance which we think should be decided in advance of any trial below on the merits. Accordingly, we do not oppose the granting of the writ of certiorari.

J. CRAWFORD BIGGS,
Solicitor General.
PAT MALLOY,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

SEPTEMBER 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 434

ADA L. BURROUGHS AND JAMES CANNON, JR., petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Supreme Court of the District of Columbia (R. 28–30) has not been reported. The majority and dissenting opinions in the Court of Appeals of the District of Columbia (R. 33–44) are reported in 65 F. (2d) 796.

JURISDICTION

The judgment of the Court of Appeals was entered May 15, 1933. (R. 45.) A motion for a rehearing was denied June 10, 1933. (R. 45–46.) The petition for writ of certiorari was filed in this Court September 6, 1933, and was granted October

23, 1933. (R. 49.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Federal Corrupt Practices Act is unconstitutional in so far as it requires the treasurer of a political committee to file with the Clerk of the House of Representatives statements of contributions made to or for the political committee for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors in two or more States.

2. Whether the indictment is fatally defective.

STATUTE INVOLVED

The pertinent provisions of the Federal Corrupt Practices Act of 1925, c. 368, Title II, 43 Stat. 1053, 1070–1074, are set forth in the Record at pages 34 to 36.

STATEMENT

An indictment in ten counts was returned against the petitioners in the Supreme Court of the District of Columbia. (R. 1–21.) The first eight counts charged the petitioners with violating Section 244 of Title 2 of the United States Code (the Federal Corrupt Practices Act of 1925).[1] (R. 35.)

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[1] To conform with the indictment and the opinion below, the section numbers of the Act as they appear in the United States Code rather than as they appear in the Statutes at Large are used.

The last two counts charged conspiracies, in violation of Section 37 of the Criminal Code (U.S.C., Title 18, Sec. 88), to commit the offenses alleged in the preceding counts.

Each of the counts alleged that during the period from July 22, 1928, to and including March 16, 1929, the petitioner Burroughs was the treasurer of a certain political committee called the "Headquarters Committee Anti-Smith Democrats," which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice-presidential electors in two States.

The first count charged that at divers times during the period mentioned contributions of money totalling $58,000 were made by one E. C. Jameson "for said political committee" in amounts ranging from $5,000 to $10,000. These contributions are set forth in a table appearing in the count. The first contribution was made September 18, 1928; the last was made October 19, 1928. The count continues with the allegation that between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which presidential and vice-presidential electors were elected in the several States, it became the lawful duty of petitioner Burroughs as treasurer of the political committee to file with the Clerk of the House of Representatives a statement, complete as of the day next preceding the date of the filing thereof, containing the name and address of

the contributor Jameson, together with the amount and date of each of his contributions for the political committee.

The count then charged that petitioner Burroughs—

> unlawfully and feloniously did willfully violate a certain provision of chapter 8 of title 2 of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, between said 10th and 15th days next preceding said general election, a statement pertaining to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully and feloniously willfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contribution—, containing any such information.

The count concluded by naming petitioner Cannon as a principal, it being charged that he unlawfully and feloniously did willfully aid and abet petitioner Burroughs in the commission of the above-described offense, "well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, to file such statement pertaining to said contributions of said E. C. Jameson for said po-

litical committee with said Clerk" of the House of Representatives.

This count of the indictment was based upon paragraph (b) of Section 252 of the Act (R. 36) which punishes, as felonies, "willful" violations of the statute.

The second count was predicated upon the same facts but alleged merely that the violation of the statute was "unlawful" rather than "willful." This count was based upon paragraph (a) of Section 252 of the Act, which provides for the punishment, as misdemeanors, of "violations" of the statute. (R. 36.)

The same plan was followed in the next six counts of the indictment. The third and fourth counts charged a failure to report on the 5th day prior to the general election of November 6, 1928, the same contributions referred to in the first and second counts.

The fifth and sixth counts charged a failure to report on January 1, 1929, contributions made by Jameson during the calendar year 1928 totalling $62,300 (the contributions referred to in the preceding counts, plus an additional contribution of $4,300 made on December 6, 1928).

The seventh and eighth counts charged a failure to report between the 1st and 10th days of March, 1929, a contribution of $3,000 made by Jameson on January 14, 1929.

Of these counts the third, fifth and seventh charged that the offenses were "willfully" com-

mitted; the fourth, sixth and eighth charged merely that the offenses were "unlawfully" committed.

The ninth count charged the petitioners with conspiring to commit the four "willfully" committed offenses specified in the first, third, fifth and seventh counts, while the tenth count charged them with conspiring to commit the four unlawfully committed offenses alleged in the second, fourth, sixth and eighth counts of the indictment. Both of the conspiracy counts, after setting forth in detail the contributions made by Jameson for the political committee and alleging that it was the duty of the petitioner Burroughs as treasurer of the committee to file a statement of the contributions with the Clerk of the House of Representatives, alleged that each of the petitioners herein (Burroughs as treasurer and Cannon as chairman of the political committee) "then well knowing all the premises aforesaid, unlawfully and feloniously did conspire * * * to commit" the substantive offenses charged in the eight preceding counts, the allegations of which were incorporated by reference. A number of overt acts were charged in each of the conspiracy counts.

A demurrer was interposed by the petitioners herein to the indictment on two grounds, (1) that the Corrupt Practices Act, "in so far as it attempts to regulate contributions and expenditures made to influence the election of presidential and vice presidential electors in the several States" was in

violation of various provisions of the Constitution, and (2) that the indictment was insufficient as a pleading. (R. 21–28.) The Supreme Court of the District of Columbia sustained the demurrer on the ground that the indictment was insufficient as a pleading. (R. 28–30.) The court stated that as its action disposed of the indictment it became unnecessary to pass upon the constitutional question presented by the demurrer. (R. 30.)

An appeal was taken by the Government to the Court of Appeals of the District of Columbia. (R. 30–31.) That court certified to this Court the question whether it had jurisdiction to entertain this appeal or whether the appeal should have been taken to this Court under the Criminal Appeals Act. This Court held that the Court of Appeals had jurisdiction of the appeal under a provision of the Code of Laws for the District of Columbia. (289 U.S. 159.)

The Court of Appeals then rendered an opinion, holding that the trial court erred in sustaining the demurrer to the indictment. It held that all of the counts of the indictment were sufficient and that the Corrupt Practices Act was not unconstitutional. (R. 33–43.) One Justice dissented upon the ground that the indictment failed "to charge the crime defined in the statute, or any offense whatever." (R. 43–44.) This Justice did not discuss the question of the constitutionality of the Corrupt Practices Act.

22625—33——2

ARGUMENT

I

BY VIRTUE OF ARTICLE 1, SECTION 8, CLAUSE 18, OF THE CONSTITUTION, AND THE TWELFTH AMENDMENT, CONGRESS IS EMPOWERED TO REQUIRE THE TREASURERS OF POLITICAL COMMITTEES TO FILE STATEMENTS OF CONTRIBUTIONS MADE TO OR FOR THE COMMITTEE FOR THE PURPOSE OF INFLUENCING OR ATTEMPTING TO INFLUENCE THE ELECTION OF PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTORS

The question which is here involved is a narrow one. The sections of the statute which are involved in this case merely provide that in Presidential elections the treasurers of political committees must file with the Clerk of the House of Representatives returns showing their receipts and expenditures. It is submitted that such legislation is clearly constitutional.

As pointed out in the opinion of the Court of Appeals (R. 38, 39), the section of the Act of 1925—

> under which the indictment in this case is brought, does not attempt to interfere in any manner with the appointment of Presidential electors, nor to control the official conduct or proceedings of such electors when appointed. The section does no more than provide that in case of the voluntary organization of political committees which accept contributions or make expenditures for the purpose of influencing or attempting to influence the election of Presidential and Vice

Presidential electors, it shall be necessary that a public statement be made in a prescribed manner showing the amount of money received and expended by such committee for such purpose. No attempt is thereby made to prescribe any penalty for the commission or omission of any act upon the part of the Presidential electors themselves, nor to impose any duty upon them. Nor does the act undertake to regulate the action or proceedings of such committees in respect to the collection or distribution of funds nor any other activity designed to aid in electing or defeating any Presidential electors. The section simply requires that an account of such collections and distributions shall be made public. The national importance of such publicity is obvious.

The Twelfth Amendment to the Constitution (Appendix, p. 43, *infra*) imposes two specific duties upon the Houses of Congress in relation to the election of a President and a Vice President. First, it provides that after the certificates of the electors have been opened by the President of the Senate in the presence of the Senate and House of Representatives, "the votes shall then be counted." Second, if no one receives a majority of the whole number of electors for President, then from the three highest on the list of those voted for by the electors, the House of Representatives shall choose the President, and if no one receives a majority for Vice President, then from the two highest on the

list, the Senate shall choose the Vice President. For a further discussion of the Twelfth Amendment see *infra*, p. 21.

There is no provision as to how the votes shall be counted, and as to whether Congress can go "behind the returns" in the event objection is filed to any certificate, or in case there are more than one certificate from the same State, as to the course to be pursued.

Constitutional authority for the enactment by Congress of the statute involved in this case is found in Article I, Section 8, Clause 18, of the Constitution, which reads as follows:

> The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Chief Justice in his lectures on the Supreme Court of the United States, commenting upon Article I, Sec. 8, Clause 18, of the Constitution, said (p. 97):

> The Constitution not only gave to Congress enumerated powers, but it provided that Congress should have authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any De-

partment or Officer thereof." This was a grant of vast content. It was an express grant, although in general terms. Its significance was early appraised in *McCulloch* v. *Maryland* (1819, 4 Wheat. 316) where it was decided that Congress had power to incorporate a bank. That power was not explicitly conferred, but it was not necessary that it should be. It was a power deemed to be essential to the execution of the authority granted. There was found to be no phrase in the Constitution which, like the Articles of Confederation, excluded what were called incidental or implied powers. Chief Justice Marshall was not content with merely deciding the precise point. He was intent on the principles underlying the decision and in the *McCulloch case,* as in others, the logic of the opinion was of far greater importance than its result in the instant case. The Chief Justice refuted the argument that the powers of the general government were delegated by the States, which alone were truly sovereign, and must be exercised in subordination to the States which alone possessed supreme dominion * * *. Congress was entitled to make all laws which should be necessary and proper for carrying the powers expressly granted into execution. The Chief Justice found that the word "necessary" did not import "an absolute physical necessity". The word frequently imported no more than that one thing "is convenient, or useful, or essential to another". And, after many illustrations,

> the Chief Justice arrived at his fundamental principle; "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." * * *

Chief Justice Marshall in the *McCulloch* case (4 Wheat. 316), in construing Clause 18, of Article I, Section 8, further said (p. 419):

> 1st. The clause is placed among the powers of Congress, not among the limitations on those powers.
>
> 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.

This grant of powers was "a grant of vast content." It made clear the power of Congress to enact any legislation which may be necessary to make effective the system of government established by the Constitution even though the particular legislation is not expressly authorized as such. It made clear the power of the Federal Government to protect its own existence against fraud and corruption as well as against open violence. And it is an essential principle of our system of government that the Federal Government may deal with its citizens directly and not through such state action as was necessary in the days of the Confedera-

tion. Except in so far as the States are expressly given power to designate the method of choosing electors, Congress must by necessary implication from powers granted to the Federal Government, be authorized to enact any legislation designed to prevent fraud and corruption in the election of the President and the Vice President of the United States.

This Court has repeatedly held that Congress may exercise powers which are not granted to it in express terms but which are necessary in order to enable the Federal Government to exercise the powers which are entrusted to it. Thus Congress may establish banking corporations as fiscal aids to the Government. (*McCulloch* v. *Maryland,* 4 Wheat. 316; *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180.) It may make the treasury notes of the United States a legal tender in payment of private debts. (*Legal Tender Cases,* 12 Wall. 457, 535; *Juilliard* v. *Greenman,* 110 U.S. 421.) It may acquire property within the limits of a State by the exercise of eminent domain. (*Kohl* v. *United States,* 91 U.S. 367; *United States* v. *Gettysburg Electric Ry. Co.,* 160 U.S. 668.) It may protect its officers from violence when they are in the discharge of their duties. (*In re Neagle,* 135 U.S. 1.) In the *Legal Tender Cases* (12 Wall. 475, 535) this Court said:

> And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given

> nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code.

And in *United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668, 683, where the Government sought to condemn land for the preservation of the battlefield at Gettysburg, the Court said:

> The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

So also, as the Presidency of the United States is a position of transcendent importance in the government of the country, as the continued existence of the country may depend upon the integrity of the man chosen for that position, Congress must have power to guard Presidential elections from fraud and corruption. This Court in *Ex parte Yarbrough* (110 U.S. 651, 657) declared emphatically that:

> If this government is anything more than a mere aggregation of delegated agents of

other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

The Constitution so spread the responsibility for the selection of a President as to grant to officers chosen under state legislation a share in the selection of the Chief Executive of the nation. But the electors are not performing any state function. The function is distinctively national in character, and, therefore, except so far as the electors are placed under state control by the Constitution, their selection must be subject to such Federal regulation as will prevent fraud and corruption in the choice of a President.

The information required to be filed by the Corrupt Practices Act might be of great value in aiding Congress to perform its constitutional duty of counting the votes and of electing the President and Vice President, where there is no election by the electors. It is of supreme importance and a matter of national concern that selection of the electors shall not be brought about by the illegal use of excessive campaign funds.

The baleful influence of the use of money in elections is so well recognized that practically all the States, as well as the Federal Government, have corrupt practices acts, the main feature of which is publicity of such contributions prior to, as well as after, the election.

When the Corrupt Practices Act was before Congress in 1924, Senator Borah offered an amendment providing for publicity respecting campaign contributions, and in speaking to his amendment said:

> Mr. President, the last few months have disclosed more pronouncedly than ever before, in my opinion, the necessity of the utmost publicity with reference to campaign funds. In my opinion, the real remedy for the abuse of the use of money in campaigns is that of publicity, rather than to undertake to control the matter through statutes which simply provide for punishment in case parties violating the law are arrested and convicted. In other words, I prefer to depend upon publicity for the purity of elections rather than criminal law.
>
> * * * * *
>
> It has been suggested that it would be sufficient to make publication of the campaign funds at the close of the campaign; but, in my opinion, that would not meet the situation. The contributions ought to be known as the campaign progresses, and the information ought to be fairly had and as fully as possible before the voters who are called upon to pass on the question, as it were, in voting for candidates upon the day of election.
>
> I think, therefore, that the publicity ought to accompany the progress of the campaign, and as nearly as it can be made to do so as a practical proposition, I desire to see that incorporated in the law.

(Cong. Rec., 68th Cong., 1st sess., Vol. 65, part 9, p. 9507.)

Senator Robinson in discussing the Borah Amendment said:

> The suggestion that full publicity respecting campaign contributions be required has value. It would penalize the candidate or the political party inviting or receiving contributions from questionable sources. It would have the effect of producing a reaction in public sentiment, which would reflect itself in election results.
>
> We all know—and I do not express this from any partisan standpoint—that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.
>
> (Cong. Rec., 68th Cong., 1st sess., Vol. 65, Part 9, p. 9507.)

The views of these two leaders of the Senate show that publicity such as is provided for in the

statute under consideration, is a matter of general public interest. If publicity of campaign contributions is "the real remedy for the abuse of money in campaigns" as asserted by Senator Borah, then a statute of Congress which undertakes to apply this remedy to Presidential elections should not be stricken down by this Court, unless it is clearly and unmistakably beyond the power of Congress. Every intendment is in favor of its constitutionality. It is conceded there is no express inhibition against such legislation.

The electors are appointed and act under and pursuant to the Constitution of the United States, and when electing the President or Vice President, they are performing a distinctively Federal function and as stated by Willoughby "On the Constitution of the United States," Vol. 3, Sec. 937, "when so acting and as to such acts, are subject to Federal supervision and control, though, of course, not to dictation as to whom they shall elect."

While the method of appointment of presidential electors is by the Constitution committed to the state legislatures, yet after they are selected, and have made their returns to the Congress, everything thereafter is exclusively committed to Congress. There is considerable contrariety of opinion as to the power of Congress with reference to the validity or legality of the votes of the electors in connection with its duty to count the votes. The Twelfth Amendment provides that the "votes

shall be counted," but makes no provision as to the power of Congress in this regard.

The first action by Congress on this question was in 1865. When Congress was about ready to count the electoral votes in the Presidential Election of 1864, a serious question arose as to whether the certificates of electoral votes from the Southern States should be received and counted or rejected. Certificates had been received from Louisiana and Tennessee. President Lincoln was committed to the validity and regularity of the Governments of these two States. A state government was in full operation in Louisiana and the election in Tennessee had been ordered by Governor Andrew Johnson, the candidate for Vice President on the ticket with President Lincoln. Stanwood, History of the Presidency, I, 309.

A joint resolution was passed by both Houses of Congress in January, 1865, providing that no electoral votes from any of the Southern States should be received or counted concerning the choice of President and Vice President for the ensuing term. The President was opposed to the resolution, as it in effect declared the invalidity of the governments of Tennessee and Louisiana. Congress was determined that the votes should not be counted and it was decided that if the votes from Louisiana and Tennessee could not be excluded by law, they could be by a joint action of the two houses in counting the vote. Accordingly, fearing that the President

would not sign the joint resolution, both branches of Congress passed the "twenty second joint rule," which provided that "no vote objected to should be counted except by the concurrent votes of the two Houses." This joint rule remained in force until January 20, 1876.

President Lincoln delayed action on the joint resolution until the day fixed for counting the electoral votes and signed the resolution on that day, and returned it to the House with his formal approval, in a message asserting his view that "the two Houses of Congress * * * have complete power to exclude from counting all electoral votes deemed by them to be illegal." (Cong. Globe, 38 Cong., 2d sess., I, 711.)

It was this omission in the Constitution which gave rise to the Hayes-Tilden contest in 1877, resulting in the creation of the Electoral Commission of 1877.

The Act creating this commission (January 29, 1877, c. 37, 19 Stat. 227) was entitled "An Act to provide for and regulate the counting of votes for President and Vice President, and the decision of questions arising thereon, for the term commencing March 4, A.D. 1877." Provision was made for interposing objections to the certificates of the electors.

The next legislation on this subject was the Act of February 3, 1887, ch. 90, 24 Stat. 373, which is entitled "An Act to fix the day for the meeting of the electors of President and Vice-President, and

to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon," and which contains a provision for objections being filed to the certificates of the electors. This Act provides that the two Houses concurrently may reject votes of electors from a State, though there is only one return or certificate, when they agree that the vote has not been regularly given by the electors. If there is more than one return from a State, the procedure is prescribed for determining which return shall be counted.

This Act is still in force. U.S.C., Title 3, Sec. 17.

It is contended that the specific authority conferred by the Twelfth Amendment upon Congress to count the electoral votes for President and Vice President, and to elect a President and Vice President in the event of no election in the electoral college, carries with it no power except to add up the returns which upon their face appear regular regardless of fraud or illegality. The foregoing Acts of Congress show that for many years Congress has determined otherwise, and takes the view expressed by President Lincoln that the two Houses of Congress have complete power to exclude from counting all electoral votes *deemed by them illegal.*

THE TWELFTH AMENDMENT VESTS IN CONGRESS IMPORTANT POWERS AND DUTIES IN CONNECTION WITH THE ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT

Presidential electors are chosen in each State "in such manner as the legislature thereof may

direct." But they ballot only once and unless at that time a majority votes for the same candidate for President, the election of that official rests with the House of Representatives, and unless a majority votes for the same candidate for Vice President, the election rests with the Senate. The House and the Senate must choose from among the candidates voted for by the electors. Because the Houses of Congress possess such contingent power, which when exercised must be exercised promptly, Congress by necessary implication is empowered to observe whether electors, whose votes in the Electoral College select the candidates who may be considered by the Houses of Congress, are chosen with the aid of excessive campaign funds. In this respect, at least, the nature of the contests in the several States furnishes a proper basis for later action by the Houses of Congress; and Congress may by securing the necessary information prepare for the exercise of powers which the Constitution bestows, even though only contingently, upon the House of Representatives and the Senate.

A brief survey of the Constitution as considered in the Federal Convention of 1787 and as originally adopted, as amended in 1804, as applied in 1825 and 1837, and as amended again in 1933, will show that from the beginning of our government down to the present moment the Houses of Congress have possessed important powers in connec-

tion with the selection of the President and the Vice President of the United States.

The framers of the Constitution devised a complicated procedure for Presidential elections. Article II provided that the electors should be chosen in each State in accordance with state law; but they might meet only in their respective States; they must meet on the same day throughout the United States, and they might vote only once. Each elector might vote for two candidates, of whom one at least should not be an inhabitant of the same State as the elector. Unless, under such conditions, a preponderant majority of the electors voted for the same person for President, the House of Representatives selected the President, deciding between the two leading candidates if both candidates received the votes of a majority of the electors, as happened in 1801, or, if no candidate received a majority of the electoral votes, choosing any one of the five leading candidates, the Representatives from each State acting as a unit. After the choice of the President, the person having the greatest number of electoral votes was to be Vice President unless two persons received an equal number of votes, in which case the Senate was to select one of those two for that office.

The members of the Federal Convention did not anticipate that the electors would usually make the eventual choice of the President. On September 4 Mason declared that nineteen times in twenty the

President would not be chosen by the electors and Wilson substantially agreed with him. On the following day Pinckney expressed similar views. Mason said that it would rarely happen that a majority of the electoral votes would fall on any one candidate. He moved for election by plurality. The motion was overwhelmingly defeated. On September 6 Hamilton declared that the electors would not choose the President. The plan of the special committee had called for the eventual election by the Senate. Spaight contended that the electors should meet at the seat of the general government and decide finally without any reference to the Senate. Only one State voted for his motion. Wilson contended that the Senate had already been given so much power that it should not be allowed in fact to appoint the President. Doubtless for this reason, expressed also by Gerry, Williamson, Gouverneur Morris and Mason, the Convention accepted an amendment proposed by Sherman under which the House of Representatives, voting by States, was to make the eventual election.

In the Virginia convention Mason declared that the choice of the electors would not be decisive once in fifty times. Madison replied that the method of electing the President was a compromise under which the small States would have the advantage in the eventual election. (Elliot, Debates, III, 493, 495.) And in the North Carolina convention Spaight and Davie, who had been members of the Philadelphia convention, and Iredell, who was

afterwards a Justice of this Court, declared that as the electors must meet upon the same day throughout the country they could not confer together and combine. (Elliot, IV, 105, 122.)

In Number 39 of the Federalist Madison said that "The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives." In Number 66 Hamilton declared that the House of Representatives "will be the umpire in all elections of the President which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen."

Similar statements as to the compromise under which the eventual election of the President was given to the House of Representatives were contained in speeches by McHenry and Martin before the Maryland legislature in 1787 and in later speeches and writings by Dayton, Gouverneur Morris, King, and Madison. (Farrand, Records of the Federal Convention, III, 150, 217, 401, 405, 461, 462, 464.)

These provisions of the Constitution did not operate in all respects as had been anticipated. Electors voted in their respective States, but this requirement lost its significance when political parties nation-wide in scope were organized and electors simply voted for party candidates. The provision that each elector should vote for two men for the Presidency, of whom the man who received

next to the most votes should become Vice President, thwarted the popular will as to the Vice Presidency in 1797 and almost thwarted it as to the Presidency in 1801. (Stanwood, History of the Presidency, 1928 ed., I, 50, 52, 70.) After discussion which began in January, 1797, and lasted until 1804 (Ames, Proposed Amendments to the Constitution, 77, 323, 325; Stanwood, I, 77–79; Annals of Congress, VI, 1824; XI, 602, 1293, 304; XIII, 95, 543 note, 207, 775), the provision was changed by the Twelfth Amendment, called by its advocates a designating or discriminating Amendment (Annals, XIII, 16, 135, 180, 198), so that thereafter each elector voted for one person for President and for one person for Vice President; if no candidate for the Presidency received a majority the House of Representatives was to choose one of the three highest on the list; and if no candidate for the Vice-Presidency received a majority of the votes the eventual election was to be made by the Senate. Factional opponents had declared that the Amendment would reduce the influence of the smaller States in the election of the President (e.g., Annals, XIII, 164, 179, 516, 517); but most of the smaller States ratified it. (Annals, XIII, 104, 696, 770; Ames, 325.)

After the adoption of that Amendment only a majority of the electors could make a final election of either a President or a Vice President. In 1825 the eventual election of a President was by the House of Representatives and in 1837 the eventual

election of a Vice President was by the Senate. (Stanwood, I, 140, 187.) Story, Commentaries on the Constitution, declared (sec. 1464):

> The principal difficulty, which has been felt in the mode of election, is the constant tendency, from the number of candidates, to bring the choice into the House of Representatives. This has already occurred twice in the progress of the government; and in the future there is every probability of a far more frequent occurrence.

That the requirement of majority and not merely plurality votes in order to make the decisions of the Electoral College conclusive has not more frequently thrown the elections of President and Vice President into the Houses of Congress has been due simply to the fact that the United States, unlike European countries, has usually had only two important political parties, so that a plurality was a majority. That this condition may not always prevail was recognized by Congress when it framed the Twentieth Amendment. By that Amendment the terms of Senators and Representatives are made to begin on the 3d of January and the terms of the President and the Vice President are made to begin on the 20th of January, for the purpose of allowing the choice of the President and the Vice President, if there are not majorities in the Electoral College, to fall upon newly elected members of Congress and not upon members who were elected

two years before. Such a purpose on the part of those who framed the Amendment was shown by committee reports and by debates in Congress. (72d Cong., 1st sess., Sen. Rep. 26, House Rep. 345; 75 Cong. Rec., pt. 2, pp. 1372, 1373, pt. 4, pp. 3824, 3828, 3833.)

In short, the eventual elections of the President and the Vice President may rest with the Houses of Congress. This was not only provided for by the Constitution as adopted in 1788 and as amended in 1804 but, the Houses of Congress which framed the Twentieth Amendment and the States which made it a part of the Constitution in 1933 recognized it as a practical possibility for which they specially provided in terms newly introduced into the Constitution. Not only in theory but in practice, the Houses of Congress may be the authorities which eventually elect the President and the Vice President.

As the House of Representatives may be called upon to select a President from the three men most favored by the electors and the Senate to choose a Vice President from the two candidates favored for that office by the Electoral College, the House and the Senate are entitled to observe the manner in which the men who are presented to it for consideration have been chosen. Congress may require the submission to it of information which is not strictly private in its nature and which may, in its judgment, aid it in the exercise of powers which

are entrusted to it by the Constitution. This Court has repeatedly so held.

In re Chapman, 166 U.S. 661, involved the prosecution of a broker dealing in the stock of a sugar company who refused to testify before a Senate committee investigating the question whether any Senator had been speculating in sugar stocks during the consideration of the tariff bill then before the Senate. This Court said (p. 671):

> we quite agree with Chief Justice Alvey, delivering the opinion of the Court of Appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions"; and that it was to effect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof.

In *McGrain* v. *Daugherty*, 273 U.S. 135, which involved an investigation by the Senate into the administration of the Department of Justice, this Court upheld the arrest of a contumacious witness in pursuance of a Senate resolution. After reviewing the legislative practice, congressional enactments and court decisions (pp. 161–174) the Court said (pp. 174, 175):

> We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the

legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both Houses have employed the power accordingly up to the present time. * * * So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. * * * A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

And in *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, this Court decided that the Senate might, in the exercise of its power to judge of the elections, returns and qualifications of its members, compel witnesses to attend at its bar for the purpose of submitting to interrogation.

It is clear, then, that Congress is entitled to secure information "to enable the respective bodies to discharge their legitimate functions." And campaign funds certainly are not matters of merely private concern. The Act of February 28, 1925, c. 368, sec. 307, 43 Stat. 1053, 1072, U.S.C., Title 2, sec. 246, requires each candidate for election to Congress to file a public statement of receipts and expenditures in his campaign; and the statutes of every State of the Union except only Illinois, Mississippi and Rhode Island, require the filing of statements of receipts and expenditures in the primary elections or, much more frequently, in both the primary and the general elections of those States. Congress is entitled to know how much money has been raised and spent in each State in Presidential campaigns.

Moreover, as a President must be chosen before the 20th of January, Congress cannot wait until the electors have voted before it begins to assemble pertinent information as to the campaigns. It must have power to require that the recording of receipts and expenditures begin even before the electors are chosen, so that the inspection of those records may begin at once. Even though Congress

may take no action upon them at the time, it may well feel that the fact that they may be inspected by the public will do much to prevent misrepresentations in the returns. As the Constitution contemplates and provides for the eventual elections of the President and the Vice President by the Houses of Congress, Congress may properly prepare to make such elections even though the power to make the eventual elections is only a contingent one. Congress is also entitled to this information in order to properly discharge its duty to count the returns of the electoral votes.

II

THE INDICTMENT IS NOT FATALLY DEFECTIVE

The petitioners contend that because the indictment merely charged that one E. C. Jameson made contributions "for the political committee" instead of "to the political committee," this is an allegation of *indirect* contributions within the meaning of the Corrupt Practices Act and that therefore the indictment is defective because it failed to contain any allegations showing that the treasurer of the committee had knowledge of the contributions. According to the petitioners the indictment should have contained allegations that the contributions were accepted by the committee and were accounted for to the petitioner Burroughs as treasurer.

The position of the petitioners, as we understand it, is that where a contribution is not made directly

to the treasurer of a political committee, there is no obligation on the part of the treasurer to report it, unless the person to whom the contribution was made for the committee has rendered an account thereof to the treasurer of the committee. Under this theory it is of course immaterial that the treasurer may otherwise have known of the contribution. In reaching this conclusion the petitioners rely upon what we believe is a misconstruction of Section 243 of the statute. (R. 35.)

We think it is obvious that that section has no bearing upon the responsibility of the treasurer of a political committee to report contributions. It merely penalizes any person who, for or on behalf of a political committee, receives a contribution but fails to account for it to the treasurer of the committee. We must turn to other sections of the statute to determine the nature of the responsibility of the treasurer of a political committee with reference to reporting contributions.

Section 242 (b) of the Act (R. 34) makes it the duty of the treasurer of a political committee to keep a detailed and exact account of all contributions made to or for such committee, including the name and address of every person making any such contribution and the date thereof. We come now to Section 244 of the Act. (R. 35.) This section specifically makes it the duty of the treasurer of a political committee to file with the Clerk of the House of Representatives, at certain stated times, a statement containing "the name and address of

each person who has made a contribution to or for such committee in one or more items of the aggregate amount or value, within the calendar year, of $100 or more, together with the amount and date of such contribution." Another provision of this section requires the reporting, but not in detail, of sums contributed which do not aggregate $100. This is the only section of the statute which defines the duty and responsibility of the treasurer of a political committee in reporting contributions.

There is clearly nothing in this section which limits such responsibility either to contributions made directly to the treasurer of the committee or to those which have been accounted for to the treasurer by persons who receive them for the committee. As we view this section, it relates to any contribution made to or for a political committee of which the treasurer has knowledge. If the statute is viewed in this light, we think there can be no difficulty in determining the meaning of the penalty provisions of Section 252. (R. 36.) Paragraph (a) of this section makes it a misdemeanor for any person to "violate" any of the provisions of the Act, while paragraph (b) makes it a felony for any person to "willfully" violate any of the provisions of the statute. Under our interpretation of the statute, the treasurer of a political committee may not be penalized under either paragraph of Section 252 for failing to report a contribution unless he has knowledge of such contribution. The

distinction between the two paragraphs of that section is, we think, that under paragraph (a) the treasurer is punishable where he has knowledge of a contribution but merely through inadvertence, carelessness or neglect, or for some similar reason, fails to make the required report, whereas, under paragraph (b), he is punishable if, having knowledge of a contribution, he intentionally fails to report it.

With reference to the contention of the petitioners that the indictment should have alleged that the contributions were accepted by the committee, we submit that as the indictment uses the language of the statute in charging that Jameson made contributions "for the committee," this is sufficient.

We come now to the question whether the indictment sufficiently charged that petitioner Burroughs as treasurer of the committee had knowledge of the contributions which Jameson made for the committee.

(a) The "Willful" Counts

We submit that there can not be any serious question that knowledge by petitioner Burroughs as treasurer of the committee of the contributions made by Jameson for her committee is sufficiently charged in the first, third, fifth, and seventh counts, the so-called "willful" counts. These counts are based upon Section 252 (b) of the statute (R. 36) which punishes, as a felony, a "willful" violation of that Act. In each of these counts it is alleged that

the petitioner Burroughs as treasurer of the committee "unlawfully and feloniously did willfully violate" Section 244 of the Corrupt Practices Act by "unlawfully and feloniously willfully failing to file" the required statement of contributions with the Clerk of the House of Representatives. It is settled by the decisions of this Court that the word "willfully" implies that the act was knowingly and intentionally done. *Potter* v. *United States*, 155 U.S. 438, 446; *Spurr* v. *United States*, 174 U.S. 728, 734–735. See also *Chicago, St. P., M. & O. Ry.* v. *United States*, 162 Fed. 835 (C.C.A. 8th), certiorari denied, 212 U.S. 579.

In the light of these authorities, it is manifest that the allegation that petitioner Burroughs "did willfully violate" the statute by "willfully failing to file" a statement of the Jameson contributions means that petitioner Burroughs acted with knowledge of the contributions and of her duty to report them.

Furthermore, it should be borne in mind that here the offenses charged involve a "willful" failure to report the Jameson contributions. The charge of such "willful" failure must necessarily imply that it occurred knowingly and intentionally.

(b) The "Unlawful" Counts

In the second, fourth, sixth and eighth counts the indictment charged that petitioner Burroughs as treasurer of the political committee "unlaw-

fully did violate" Section 244 of the Act by "unlawfully failing to file" with the Clerk of the House of Representatives statements of the Jameson contributions. These counts are based upon paragraph (a) of Section 252, which makes it a misdemeanor for any person to "violate" any provision of the statute.

The court below, in dealing with these counts, said (R. 42):

> In the second, fourth, sixth, and eighth counts of the indictment the term "willfully" does not appear, the charge being that the offense was "unlawfully" committed. However, the crime charged in these counts is purely statutory and the statute makes no mention therein of a specific intent. In such cases it is held that whether scienter is a necessary element of the crime, though not expressed in the statute, is a question of legislative intent to be answered by a construction of the statute, and that punishment for an illegal act done by one in ignorance of the facts making it illegal, is not necessarily contrary to due process of law. *United States* v. *Balint,* 258 U.S. 250; *United States* v. *Behrman,* 258 U.S. 280, 288.

We are of the opinion that these counts are bad unless the allegation that the offenses were "unlawfully" committed imports knowledge by the petitioner Burroughs of contributions made by Jameson for the committee. In *United States* v. *Bard-*

enheier, 49 Fed. 846 (E.D. Mo.) the defendant was indicted for unlawfully altering revenue marks and stamps. The court said (p. 847):

> It will be conceded that an unintentional or accidental erasure of a stamp, or some part of it, is not an offense under section 3326. An indictment or information thereunder should accordingly allege that the act was done knowingly and intentionally, or it should employ language of a similar import. The present information avers that the defendant "did unlawfully change and alter" the marks and stamps in question. This sufficiently shows that the act was done willfully and intentionally, as otherwise it could not be said to have been done unlawfully.

(c) The Conspiracy Counts

In testing the sufficiency of the conspiracy counts, it is obvious that a different standard must be applied from that applied in the case of the substantive counts. The gist of the offense charged in each of the conspiracy counts was the unlawful agreement or understanding not to do an act which was required by the statute. It was not necessary in these counts to allege with technical precision all the elements essential to the commission of the offenses which were the objects of the conspiracies, or to state such objects with the detail required in an indictment for the substantive offenses. As was said in *Williamson* v. *United States*, 207 U.S. 425, 447, "certainty, to a common intent, sufficient to

identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." See also *United States* v. *Rabinowich*, 238 U.S. 78; *Frohwerk* v. *United States*, 249 U.S. 204; *Wong Tai* v. *United States*, 273 U.S. 77.

The first conspiracy count (the ninth count) specifically charged (R. 14–15) that the petitioner Burroughs was the treasurer of a political committee during the period from July 22, 1928, to March 16, 1929; that one Jameson on various dates during that period contributed the aggregate sum of $65,300 for that political committee; that at certain times during the period mentioned it was the duty of the petitioner Burroughs, as the treasurer of the political committee, to file with the Clerk of the House of Representatives a statement, as required by Section 244, of the details of these contributions; that the petitioner Burroughs, as treasurer, and the petitioner Cannon, as chairman of the political committee, "then well knowing all the premises aforesaid, unlawfully and feloniously did conspire, combine, confederate and agree together * * * to commit * * * the four willfully committed offenses" charged in the first, third, fifth and seventh counts of the indictment, the allegations of which were incorporated by reference. The second conspiracy count (the tenth count) is substantially the same, except that it alleges a conspiracy to commit the four unlawfully committed offenses specified in the second, fourth, sixth and

eighth counts of the indictment, which counts were likewise incorporated by reference.

It is difficult to perceive how the petitioners could "conspire * * * and agree together" to fail to file the statements of contributions required by the statute without having knowledge of these contributions. It is evident, therefore, that there was a sufficient averment of scienter in each count.

Furthermore, so far as the conspiracy alleged in the ninth count to "willfully" violate the statute is concerned, there can be no question that the word "conspire" imports an intent to violate the statute. As was said in *Frohwerk* v. *United States,* 249 U.S. 204, 209—

> intent to accomplish any object cannot be alleged more clearly than stating that parties conspired to accomplish it.

Moreover, as stated above, each of the conspiracy counts charged that the defendants did conspire "well knowing all the premises aforesaid." It is submitted that this in itself sufficiently charged knowledge of the contributions. The phrase, "all the premises aforesaid," referred to all the facts previously alleged in the conspiracy counts, including the fact that certain contributions were made on certain specified dates by Jameson for the committee. See *Brooks* v. *United States,* 267 U.S. 432, 440.

Similar allegations as to the Jameson contributions appearing in the substantive counts were also incorporated by reference in the conspiracy counts. It should be noted that even if any of the sub-

stantive counts are bad, their averments may nevertheless be treated as a part of the conspiracy counts by reference, without affecting the sufficiency of those counts. See *Blitz* v. *United States,* 153 U.S. 308, 317; *Fuller* v. *United States,* 53 App. D.C. 88, 288 Fed. 442.

In testing the sufficiency of the indictment in this case it must be remembered that the offenses charged were purely statutory. "In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter." *Pounds* v. *United States,* 171 U.S. 35, 38. As stated in *Cochran and Sayre* v. *United States,* 157 U.S. 286, 290, "the true test is, not whether it [the indictment] might possibly have been more certain, but whether it contains every element of the offence intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." See also *Evans* v. *United States,* 153 U.S. 584; *Dunbar* v. *United States,* 156 U.S. 185.

The indictment, we submit, did not omit any essential element of the offenses charged and it was sufficiently specific to permit the petitioners to prepare their defense and to plead a judgment under

the indictment as a bar to any further prosecution for the same offense.

It was not necessary to state in the indictment such details as the identity of the members of the political committee or of the persons to whom the contributions were made. These details were mere matters of evidence. *Cf. Evans* v. *United States, supra; Cochran and Sayre* v. *United States, supra; Stokes* v. *United States,* 157 U.S. 187; *Burton* v. *United States,* 202 U.S. 344. The identity of the members of the political committee or of the person or persons to whom the contributions were made are not elements of the offenses charged. A defendant may be fully informed of such details by a bill of particulars. *Bartell* v. *United States,* 227 U.S. 427, 432–433; *Rudner* v. *United States,* 281 Fed. 516, 518 (C.C.A. 6th), certiorari denied, 260 U.S. 734.

CONCLUSION

For the reasons hereinbefore given it is respectfully submitted that the Corrupt Practices Act, in so far as it relates to presidential and vice presidential electors is constitutional and valid, that the indictment herein is not bad in form or substance, and that the judgment below should be affirmed.

J. CRAWFORD BIGGS,
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NOVEMBER 1933.

APPENDIX

THE TWELFTH AMENDMENT

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member

or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 434.—October Term, 1933.

Ada L. Burroughs and James Cannon, Jr., Petitioners, *vs.* The United States of America. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[January 8, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

An indictment returned by a grand jury sitting in the District of Columbia charges petitioners, in ten counts, with violations of the Federal Corrupt Practices Act of February 28, 1925, c. 368, Title III, 43 Stat. 1053, 1070; U. S. C., Title 2, § 241, *et seq.* The pertinent provisions of the act are contained in §§ 241, 242 and 243, reproduced in the margin,* and in §§ 244 and 252. Section

*"Section 241. **Definitions.**—When used in this chapter—

"(c) The term 'political committee' includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more State, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization;

"242. **Chairman and treasurer of political committee; duties as to contributions; accounts and receipts.**—(a) Every political committee shall have a chairman and a treasurer. No contribution shall be accepted, and no expenditure made, by or on behalf of a political committee for the purpose of influencing an election until such chairman and treasurer have been chosen.

"(b) It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

"(1) All contributions made to or for such committee;

"(2) The name and address of every person making any such contribution, and the date thereof;

"(3) All expenditures made by or on behalf of such committee; and

241 defines the term, "political committee," as including any organization which accepts contributions for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors in two or more states. Every political committee is required to have a chairman and a treasurer before any contribution may be accepted. One of the duties of the treasurer is to keep a detailed and exact account of all contributions made to or for the committee. Every person who receives a contribution for a political committee is required to render to the treasurer a detailed account thereof, with specified particulars. By § 244, the treasurer is required to file with the clerk of the House of Representatives, at designated times, a statement containing the name and address of each contributor, date and amount of each contribution and other particulars, complete as of the day next preceding the date of filing. By § 252 (a), penalties of fine and imprisonment are imposed upon any person who violates any of the provisions of the chapter; and by subdivision (b), increased penalties are imposed upon any person who willfully violates any of those provisions.

The first eight counts of the indictment purport to charge petitioners with substantive violations of the act, and the ninth and tenth counts, with conspiracy to violate it—four of the eight counts charging willful violations; the other four merely charging violations, that is to say unlawful violations.

In the supreme court of the District, a demurrer was interposed to the indictment on the grounds (1) that each count of the indictment failed to allege facts sufficient to constitute an offense

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"(4) The name and address of every person to whom any such expenditure is made, and the date thereof.

"(c) It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure by or on behalf of a political committee exceeding $10 in amount. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

"243. **Accounts of contributions received.**—Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

against the United States; and (2) that the Federal Corrupt Practices Act contravenes § 1, Art. II, of the federal Constitution, providing for the appointment by each state of electors. The District supreme court, sustained the demurrer upon the first ground, rendering unnecessary any ruling as to the second. Upon appeal to the District court of appeals the judgment was reversed. That court ruled each of the ten counts sufficient, and upheld the constitutionality of the act. App. D. C. , 65 F. (2d) 796. The case is here on certiorari.

First. We do not stop to describe the eight substantive counts. In the opinion of a majority of the court, there is a failure in each count to charge an offense under the statute. The conspiracy counts we hold are sufficient. The ninth count charges with particularity that the petitioner Burroughs was the treasurer of a designated political committee from July 22, 1928, to and including March 16, 1929, which committee during that period accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two states. The several amounts of certain contributions made for the committee are set forth, together with the dates when made and the name of the contributor. The count recites the duty of Burroughs under the statute to make the statements therein prescribed in respect of these contributions, and charges that both petitioners, one as treasurer and the other as chairman of the committee, "then well knowing all the premises aforesaid," unlawfully and feloniously did conspire together and with other persons to commit "the four willfully committed offenses" charged against Burroughs as treasurer in the first, third, fifth and seventh counts of the indictment, namely, willful failure to file the statements of such contributions required by § 244, the allegations of those counts being incorporated by reference as fully as if repeated. The count further alleges certain overt acts committed in pursuance of the conspiracy.

The tenth count charges in substantially identical language a conspiracy to commit the four offenses not designated as willful, charged in the second, fourth, sixth and eighth counts of the indictment, namely, unlawful failure to file the required statements, the allegations of those counts being likewise incorporated by reference as fully as if repeated.

We are of opinion that these allegations are sufficient in each count to charge a conspiracy to violate the pertinent provisions of the act. Knowledge of the facts constituting the contemplated substantive offenses is sufficiently alleged by the phrase, "well knowing all the premises aforesaid." *Brooks* v. *United States,* 267 U. S. 432, 439-440. And intent unlawfully, or unlawfully and willfully, to evade performance of the statutory duty is clearly enough alleged by the statement that the accused conspired to do so. *Frohwerk* v. *United States,* 249 U. S. 204, 209. Moreover, quite apart from the question of their legal sufficiency to charge substantive offenses, the eight counts which are incorporated by description set forth the pertinent facts, and may be considered in determining the adequacy of the conspiracy counts. *Crain* v. *United States,* 162 U. S. 625, 633; *Blitz* v. *United States,* 153 U. S. 308, 317. These facts are narrated by the court below and need not be repeated here.

Second. The only point of the constitutional objection necessary to be considered is that the power of appointment of presidential electors and the manner of their appointment are expressly committed by § 1, Art. II, of the Constitution to the states, and that the congressional authority is thereby limited to determining "the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." So narrow a view of the powers of Congress in respect of the matter is without warrant.

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power.

While presidential electors are not officers or agents of the federal government (*In re Green,* 134 U. S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The

President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

In *Ex parte Yarbrough*, 110 U. S. 651, this court sustained the validity of § 5508 of the Revised Statutes, which denounced as an offense a conspiracy to interfere in certain specified ways with any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States; and of § 5520, which denounced as an offense any conspiracy to prevent by force, etc., any citizen lawfully entitled to vote from giving his support, etc., toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress. The indictments there under consideration charged Yarbrough and others with conspiracies in violation of these sections. The court held, against the contention of the accused, that both sections were constitutional. It is true that while § 5520 includes interferences with persons in giving their support to the election of presidential and vice presidential electors, the indictments related only to the election of a member of Congress. The court in its opinion, however, made no distinction between the two, and the principles announced, as well as the language employed, are broad enough to include the former as well as the latter. The court said (pp. 657-658):

"That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

"If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to

protect the elections on which its existence depends from violence and corruption.

"If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."

And, answering the objection that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States but is governed by state law, the court further said (p. 663):

"If this were conceded, the importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by law of the United States, or by their united result."

And finally (pp. 666-667):

"In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.

"If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.

"If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

These excerpts are enough to control the present case. To pursue the subject further would be merely to repeat their substance in other and less impressive words.

The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone. *Stephenson* v. *Binford*, 287 U. S. 251, 272. Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in § 244 that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

The judgment of the court below will be affirmed in respect of the ninth and tenth counts of the indictment only, and the cause remanded to the supreme court of the District for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 434.—October Term, 1933.

Ada L. Burroughs and James Cannon, Jr., Petitioners, *vs.* The United States of America. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[January 8, 1934.]

Separate opinion of Mr. Justice McReynolds.

To me it seems sufficiently clear that the trial judge rightly sustained the demurrer to the entire indictment.

Since counts one to eight fail to charge any offense under the statute, but are nevertheless incorporated by reference in the conspiracy counts (nine and ten), we must carefully consider the exact language by which the latter undertake to describe the conspiracy.

Count Nine—with italics supplied—alleges—

> And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs and James Cannon, jr. hereinafter called defendants, said James Cannon, jr. throughout said period of time being the chairman of said political committee, continuously throughout said period of time, and while said Ada L. Burroughs was such treasurer of said political committee and said James Cannon, jr., was chairman thereof as aforesaid, each of said defendants then well knowing all the premises aforesaid, unlawfully and feloniously did *conspire, combine,* confederate, and agree together, and with divers other persons to said grand jurors unknown, *to commit* divers, to wit, *four, offenses* against the United States, that is to say, the four willfully-committed offenses on the part of said Ada L. Burroughs, as treasurer of said political committee, *charged against her* in the *first, third, fifth* and *seventh* counts of this indictment, the allegations of which said counts descriptive of said offenses respectively, and of the circumstances and conditions under which they were so

committed, are incorporated in this count, by reference to said first, third, fifth, and seventh counts, as fully as if they were here repeated.

Count Ten—with italics supplied—alleges—

> And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said Ada L. Burroughs and James Cannon, Jr., hereinafter called defendants, said James Cannon, jr., throughout said period of time being the chairman of said political committee, continuously throughout said period of time, and while said Ada L. Burroughs was such treasurer of said political committee and said James Cannon, jr., was chairman thereof as aforesaid, each of said defendants then well knowing all the premises aforesaid, unlawfully and feloniously did *conspire, combine,* confederate and agree together, and with divers other person to said grand jurors unknown, *to commit* divers, to wit, *four, other* offenses against the United States, that is to say, the *four offenses* on the part of said Ada L. Burroughs, as treasurer of said political committee, *charged against her* in the *second, fourth, sixth,* and *eighth counts* of this indictment, the allegations of which said counts descriptive of said offenses respectively, and of the circumstances and conditions under which they were so committed, are incorporated in this count, by reference to said second, fourth, sixth, and eighth counts, as fully as if they were here repeated.

Interpreted with proper regard to the defendants' rights, count nine, also count ten, undertakes to describe a conspiracy to commit crimes said to be charged against Burroughs in other counts. But this Court now affirms that those counts fail adequately to specify any offense whatsoever.

Thus, we have allegations of what are called conspiracies to commit crimes which are nowhere adequately described. And I cannot think that such pleading should find toleration in any criminal action.

An indictment ought to set out with fair certainty the charge to which the accused must respond. If crime has been committed, a fairly capable prosecuting officer can definitely describe it.

Here, we have an example of what seems to me inordinate difficulty unnecessarily thrust upon the accused. An experienced

trial judge was unable to find proper description of crime in any of the ten counts of the indictment. The Court of Appeals, with a judge of long service dissenting, ruled that every count was sufficient. This Court, being divided, now declares eight of the counts bad, but holds that two are sufficient.

Surely, such contrariety of opinion concerning allegations of the indictment indicates plainly enough that no man should be required to go to trial under it.